



# **Office of Inspector General**

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## **Audit Report**

### **RCRA ENFORCEMENT**

#### **REGION 2'S ENFORCEMENT OF THE RESOURCE CONSERVATION AND RECOVERY ACT (RCRA)**

**1999 -1-00224**

**DATE JULY 21, 1999**

**Inspector General Division  
Conducting the Audit**

**Region covered**

**Program Office Involved**

**Eastern Audit Division  
New York City, New York**

**Region 2**

**Division of Enforcement and Compliance  
Assistance**

**Division of Environmental Planning  
and Protection**

**Criminal Investigations Division**

## MEMORANDUM

SUBJECT: Region 2's Enforcement of the Resource Conservation  
and Recovery Act (RCRA)  
Audit Report No. 1999 -1-00224

FROM: Paul D. McKechnie  
Divisional Inspector General  
Eastern Audit Division

TO: Jeanne M. Fox  
Regional Administrator  
Region 2

Attached is our audit report, *Region 2's Enforcement of the Resource Conservation and Recovery Act (RCRA)*. This report contains findings and recommendations that are important to both EPA and the State of New Jersey.

This audit report contains findings that describe problems the Office of Inspector General (OIG) has identified and corrective actions the OIG recommends. This audit report represents the opinion of the OIG and the findings contained in this audit report do not necessarily represent the final position by the Environmental Protection Agency (EPA). Final determinations on matters in this audit report will be made by EPA managers in accordance with established EPA audit resolution procedures. Accordingly, the findings described in this audit report are not binding upon EPA in any enforcement proceeding brought by EPA or the Department of Justice.

## ACTION REQUIRED

In accordance with EPA Order 2750, you as the action official are required to provide this office a written response to the audit report within 90 days. Your response should address all recommendations, and include milestone dates for corrective actions planned, but not completed.

We have no objection to the release of this report to the public.

Should you or your staff have any questions about this report, please contact me at (617) 918-1470 or Herb Maletz, Audit Manager at (212) 637-3058.

Attachment

cc: Scott Opis - Audit Coordinator

# EXECUTIVE SUMMARY

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## INTRODUCTION

The Resource Conservation and Recovery Act (RCRA) required EPA to develop a framework of hazardous waste regulations. Congress intended that States assume responsibility for implementing RCRA regulations with oversight from EPA. However, EPA still maintained its authority to enforce RCRA regulations particularly when States were unwilling or unable to enforce. Ideally, States and EPA should work in partnership. For the RCRA program to be effective in reducing risks to human health and the environment, it is essential that RCRA violators be identified and quickly returned to compliance.

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## OBJECTIVES

The objectives of our audit were to determine:

- how the lack of RCRA reauthorization impacted Regional enforcement in New Jersey.
- whether Region 2 issued appropriate enforcement actions and assured timely compliance with enforcement actions in accordance with the 1996 EPA Enforcement Response Policy (ERP).
- whether Region 2 assured that the Resource Conservation and Recovery Information System (RCRIS) data was timely and accurately entered.

**RESULTS IN BRIEF**

Region 2 generally complied with EPA's Enforcement Response Policy (ERP) by issuing appropriate enforcement actions in New York. However, improvements were needed in assuring that enforcement actions were issued timely and that violators returned to compliance in a timely manner. The Region's limited enforcement authority in New Jersey in some cases deterred the Region from taking appropriate civil and criminal enforcement in that State. Additionally, maintaining a reliable RCRIS data base was an ongoing problem, previously reported in a 1993 OIG audit report.

During our site visit to the New Jersey Department of Environmental Protection (NJDEP), we found that NJDEP generally took timely and appropriate enforcement action as well as assured that violators returned to compliance in accordance with their enforcement documents. NJDEP's RCRIS data was not accurate. However, the Region and NJDEP have addressed this issue.

The following paragraphs summarize our findings:

**Delayed NJ RCRA Reauthorization Impacted  
Region 2's Enforcement Program**

New Jersey's new RCRA base program was still not authorized more than two and one half years after New Jersey submitted its initial application. New Jersey's RCRA base program had not been timely reauthorized because Region 2 did not aggressively encourage New Jersey to submit a complete application package. Region 2 allowed NJDEP to delay the application process by not timely elevating action to a higher management level.

As a result, Federal regulations divested EPA of its enforcement authority for certain RCRA base

program activities. Enforcement was unnecessarily delayed or not pursued against such violators who illegally shipped hazardous wastes to landfills; improperly stored chemicals near a residential neighborhood; and buried flammable paint and waste solvents on private property. Such violations potentially harmed not only the environment but nearby residents. Specifically, five criminal cases were not pursued by Federal authorities under RCRA. Two cases were referred to the State for prosecution; one may be pursued under a different Federal regulation by Federal authorities; and two other cases may have to be abandoned. At least two civil cases were also affected. Since Region 2 could not take formal enforcement action, one of the cases was eventually referred to the State for action. However, much time was lost during this process. One facility remained in non-compliance for more than 341 days after inspection, while the second facility took 577 days before it finally attained compliance.

In response to our draft report, Region 2 wrote that the Regional Administrator had recently, tentatively approved New Jersey's application for RCRA authorization. The approved program was published for public comment in the *Federal Register* on May 11, 1999. No public comments were received.

**Improvements Needed in Region 2's  
Implementation of the RCRA Enforcement  
Program**

Region 2 needs to improve its timeliness in issuing enforcement actions and documenting following-up on violators' return to compliance. Our review of 31 judgmentally selected files disclosed that Region 2 did not determine appropriate enforcement action within 90 days or document the justification for the

delay as required by the ERP for 7 of 15 sampled New York cases and 2 of 16 sampled New Jersey cases. Also, the Region took longer than the 180 days provided by the ERP to issue formal enforcement actions. Region 2 did not effectively follow up on a facility's return to compliance in 4 of 15 sampled New York cases and 8 of 16 sampled New Jersey cases. As a result, facilities were not returned to compliance as expeditiously as possible. The use of RCRA §3007 Information Request Letters often delayed the Region's ability to determine the appropriate enforcement action to take. Also, the Region did not use a tracking system to assure that actions or followup were conducted in accordance with ERP time frames. As a result RCRA program resources were not being used efficiently to carry out program goals. Also, facilities may not have been treated consistently and violators may have received an unfair economic advantage.

**Region 2 Did Not Assure that RCRIS Data Was Timely and Accurately Entered**

Region 2 continued to fall short of providing reliable Regional and State RCRIS data. Our review of 31 (judgmentally selected) Regional inspections disclosed untimely or inaccurate RCRIS data for 12 of 16 New Jersey and 13 of 15 New York files reviewed. Additionally, Region 2 did not assure that NJDEP recorded accurate data. Enforcement activity for all 11 State cases reviewed was inaccurately or incompletely entered into RCRIS. These conditions occurred because the Region did not establish adequate procedures or guidelines to assure the timely and accurate entering and reviewing of RCRIS data. Other contributing factors included Regional staff not fully using RCRIS data as a tracking tool, and Inspectors believing the system was not "user friendly." As a result, RCRIS could not provide an

accurate picture of Region 2 enforcement activity. Without reliable data, Headquarters could not measure EPA's progress in achieving the Government Performance Results Act goals related to RCRA activities. Also, the public's right to know about EPA and State RCRA enforcement activities was stymied.

During our audit, both Region 2 and the NJDEP started to address the aforementioned RCRIS reporting issues. The Region developed a customized RCRIS report to provide managers with a tracking tool and provide a means for NJDEP to review and correct RCRIS data. The NJDEP immediately corrected errors identified once it received printouts from Region 2. Region 2 continues to monitor RCRIS progress at both the State and Regional level.

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## **RECOMMENDATIONS**

To prevent similar reauthorization problems in the future, we recommend that the Regional Administrator instruct Regional staff to develop a process to avoid a lengthy period where EPA's civil and/or criminal enforcement authority would be adversely affected. We recommend establishing time frames for the process, elevating persistent problems to the Regional Administrator, withdrawing State authorization or Federal grant funds as appropriate, and developing expeditious referral procedures for criminal and civil cases during the period EPA does not retain its enforcement authority.

We also recommend that the Regional Administrator instruct the Regional Department of Enforcement and Compliance Assurance (DECA) staff to follow the ERP time frames in determining appropriate enforcement actions and document justification when

such time frames are not met; develop procedures or guidelines regarding the use of information request letters; document followup of facilities in non-compliance; and continue the development and implementation of quality control procedures to ensure the reliability and integrity of RCRIS for both Regional and State data.

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**REGIONAL COMMENTS  
& OIG EVALUATION**

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The Assistant Regional Administrator for Policy and Management responded to our draft report on May 6, 1999. The Region did not agree with all our conclusions or recommendations. At the end of each chapter, we added a summarization of the Region's response and our evaluation of their response. See Appendix 1 to read the entire Regional response. An exit conference was held on June 21, 1999.

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## **ABBREVIATIONS**

CID	Criminal investigation Division
DECA (Region 2)	Department of Enforcement and Compliance Assurance
DEPP (Region 2)	Department of Environmental Planning and Protection
EPA	Environmental Protection Agency
ERP	Enforcement Response Policy
FBI	Federal Bureau of Investigations
FMFIA	Federal Managers' Financial Integrity Act
GPRA	Government Performance Results Act
HSWA	Hazardous and Solid Waste Act
MIS	Management Information Section
MOA	Memorandum of Agreement
NEIC	National Enforcement Investigations Center
NJDEP	New Jersey Department of Environmental Protection
NOV	Notice of Violation
OECA	Office of Enforcement and Compliance Assurance
OGC	Office of General Counsel
OIG	Office of Inspector General
ORC	Office of Regional Counsel
PPA	Performance Partnership Agreement
RA	Regional Administrator
RCRA	Resource Conservation and Recovery Act

**Region 2's Enforcement of the  
Resource Conservation and  
Recovery Act (RCRA)**

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RCRIS	Resource Conservation and Recovery Information System
SNC	Significant Non-Complier
SV	Secondary Violation
TSDF	Treatment Storage and Disposal Facility

# CHAPTER 1

## INTRODUCTION

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### PURPOSE

EPA developed the Resource Conservation and Recovery Act (RCRA) regulations for the safe management of hazardous waste. EPA also delegated to State agencies the primary responsibility for implementing RCRA to ensure that the public health and environment are protected. However, EPA does not relinquish its enforcement authority when it delegates a program to a State agency. EPA can take enforcement if a delegated State agency is unwilling or unable to take enforcement.

Our audit objectives were to determine:

1. how the lack of RCRA reauthorization impacted Regional enforcement in New Jersey.
2. whether Region 2 issued appropriate enforcement actions and assured timely compliance with enforcement actions in accordance with the 1996 EPA ERP.
3. whether Region 2 assured RCRIS data was timely and accurately entered.

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### BACKGROUND

Serious environmental and health problems caused by hazardous waste mismanagement resulted in legislation and regulations to clean up waste released into the environment and to prevent further releases. Congress enacted RCRA in 1976 which established,

under Subtitle C, a framework for managing hazardous waste from generation to final disposal. Hazardous waste is solid waste which, because of its quantity, concentration, physical, chemical, or infectious characteristics, may pose a hazard to human health or the environment.

Congress intended that States assume responsibility for implementing RCRA hazardous waste regulations with oversight from the Federal Government. In order to become authorized to implement the Subtitle C program, a State must develop a hazardous waste program which is equivalent to and consistent with the Federal program and have it approved by EPA. Although a State with an authorized program has primary responsibility for administering Subtitle C, EPA retains oversight responsibility and parallel enforcement authority.

In addition, EPA awards annual grants to States, under RCRA Section 3011, for the development and implementation of hazardous waste programs. States and EPA regions negotiate the specific work that must be accomplished with the grant funds. State authorization may be withdrawn by EPA if the EPA Administrator determines that the State program no longer complies with the regulatory requirements, and the State fails to correct the problem.

**Enforcement Actions**

While State agencies conduct most facility inspections, Region 2 also conducts facility inspections using its own staff. When facilities are cited for violations during inspections, the citing Agency must take appropriate enforcement actions. Appropriate enforcement responses are discussed in EPA's hazardous waste enforcement response policy (ERP). An enforcement response may be either a formal or informal enforcement action.

Formal enforcement may take the form of an administrative order, civil lawsuit, or criminal lawsuit. A monetary penalty may be imposed as part of the enforcement action. Region 2's "complaints" were considered formal enforcement. A facility classified as a significant non-complier (SNC) merits a formal enforcement action.

The 1996 EPA ERP defined a SNC:

The designation of Significant Non-Complier (SNC) is intended to identify non-compliant facilities for which formal enforcement is appropriate. Specifically, SNCs are those facilities which have caused actual exposure to hazardous waste or hazardous waste constituents; are chronic or recalcitrant violators; or deviate substantially from the terms of a permit, order, agreement or from RCRA statutory or regulatory requirements.

An informal enforcement response involves issuing a Notice of Violation (NOV) which cites the violations and provides a schedule for returning the facility to compliance. This is the minimally appropriate enforcement action for a Secondary Violator (SV). A facility which does not meet the SNC definition is classified as an SV. An informal enforcement action does not include economic sanctions. However, a facility which fails to return to compliance following an informal enforcement response should be reclassified as a SNC and receive a formal enforcement response.

The ERP defines a chronic or recalcitrant facility as one having repeated violations (even if minor in themselves) or one that fails to quickly correct violations in the past. This designation may classify

the facility as a SNC. A facility should be evaluated on a multi-media basis to determine whether it is a chronic violator or recalcitrant. However, a facility may also be found to be a chronic or recalcitrant violator based solely on prior RCRA violations.

A core principle of EPA's enforcement and compliance assurance program is that violators should not gain an economic advantage. EPA's ERP states that an appropriate enforcement response "will achieve a timely return to compliance and serve as a deterrent to future noncompliance by eliminating any economic advantage received by the violator." An additional reason for recovering economic benefit is to eliminate the economic advantage violators gain over their competitors who have invested time and money in achieving compliance.

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**SCOPE AND  
METHODOLOGY**

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We performed this audit in accordance with *Government Auditing Standards (1994 Revision)* issued by the Comptroller General of the United States as they apply to performance audits. Our review included tests of the program records and other auditing procedures we considered necessary.

We conducted audit work at EPA's Region 2 in New York City and the New Jersey Department of Environmental Protection (NJDEP).

We reviewed facility files containing inspection reports, enforcement actions and related correspondence to determine whether Region 2 and NJDEP took appropriate enforcement actions against facilities with violations. We did not evaluate the quality of inspections.

To address our audit objectives, we conducted the following audit work:

1. Interviewed EPA Region 2 and NJDEP staff involved in RCRA activities.
2. Reviewed the inspection reports and the level of enforcement action taken by Region 2 and NJDEP in response to the cited violations.
3. Compared cited violations to the 1996 EPA ERP and NJDEP's enforcement policy to evaluate whether the level of enforcement taken complied with these policies.
4. Compared the information in the Regional and NJDEP facility files to the RCRIS database for accuracy and completeness.
5. Evaluated the timeliness and adequacy of Regional and NJDEP followup response to cited violations.
6. Interviewed various Region 2 RCRA staff, an OIG Special Agent, an FBI Agent, and the U.S. Attorney in New Jersey regarding the reauthorization of the New Jersey RCRA program and its effects. New Jersey officials declined to discuss this issue with us.

To select the facilities for review, we analyzed RCRIS printouts dated July 29, 1998, for New Jersey, and November 25, 1998, for New York.

We reviewed Region 2 and New Jersey inspections and enforcement actions for Fiscal years (FYs) 96, 97, and 98 ending June 30, 1998. For New York we reviewed Region 2's inspections and enforcement actions for FYs 96, 97, and 98.

We determined from RCRIS printouts that Region 2 performed the following number of inspections:

<b>Inspections Performed in</b>		
<b>FY</b>	<b>New York</b>	<b>New Jersey</b>
<b>96</b>	<b>317</b>	<b>66</b>
<b>97</b>	<b>238</b>	<b>122</b>
<b>98</b>	<b>446</b>	<b>149</b>

The NJDEP Director of Compliance stated they perform approximately 2500 inspections a year, which included compliance inspections and "welcome wagons." Welcome wagons were considered compliance assistance inspections.

We judgmentally selected 31 facilities with violations for review after separating formal and informal enforcement action. We used selection criteria such as: number of violations, number of inspections, type of enforcement action taken, violation classification (i.e. SNC, SV), and time lapsed since scheduled completion with no actual completion.

We reviewed management controls and procedures specifically related to our objectives. Our review of the RCRIS data management system was limited to

the verification of the accuracy of RCRIS as it pertained to inspections and enforcement and not the system as a whole.

As part of our evaluation, we reviewed Region 2's FYs 96, 97 and 98 Federal Managers' Financial Integrity Act (FMFIA) Assurance Letters. The FYs 96 and 97 letters disclosed no material weaknesses in the RCRA enforcement program. The FY 98 letter identified RCRIS as a material weakness or vulnerability. Specifically, the letter identified major RCRIS data base inventory upgrades needed for large quantity generators and treatment, storage, and disposal facilities. None of the issues mentioned in our finding on RCRIS (Chapter 4) were included in these FMFIA letters.

Our fieldwork was performed from July 13, 1998 to January 29, 1999.

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**PRIOR AUDIT  
COVERAGE**

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On January 21, 1999, the OIG issued, *Audit Report, RCRA Significant Non-Complier Identification and Enforcement by the Rhode Island Department of Environmental Management* (Report No. E1GSD8-01-0006-9100078).

On March 31, 1998, OIG issued, *Report of Audit, Significant Non-Complier Enforcement by EPA and Washington State* (Report No. EIGSF7-11-0019-8100093).

On December 15, 1993, the OIG issued, *Report of Audit of Region 2's Administration of State Resource Conservation and Recovery Act (RCRA) Enforcement Activities* (Report No. E1DSD2-02-0053-4100128). Findings were reported in the areas of: 1) States

need to take timely and complete enforcement; 2) penalties; and 3) RCRIS reliability. RCRIS reliability is a continuing problem (see Chapter 4 for more details).

## **CHAPTER 2**

### **DELAYED NEW JERSEY RCRA REAUTHORIZATION IMPACTED REGION 2'S ENFORCEMENT PROGRAM**

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New Jersey's new RCRA base program has not been authorized more than two and one half years after the State submitted its incomplete application and over four years after it informed Region 2 of its intention to repeal its existing State program. New Jersey's RCRA base program had not been timely reauthorized because Region 2 did not aggressively encourage New Jersey to submit a completed application package.

As a result, EPA no longer had enforcement authority for base program violations in the State of New Jersey. Enforcement was unnecessarily delayed or not pursued against violators who illegally shipped hazardous wastes to landfills; improperly stored chemicals near a residential neighborhood; and buried flammable paint and wastes solvents on private property. Such violations potentially harm not only the environment but also nearby residents.

Specifically, at least five criminal cases were adversely impacted by the lack of reauthorization. EPA had to discontinue pursuing two cases and refer them to the State. The Assistant U.S. Attorney is trying to prosecute one other case under a different authority. Two more cases may be dropped altogether since they cannot be prosecuted under RCRA. While prosecution was being considered, containment activities were conducted at the criminal sites. Additionally, Region 2 was unable to take formal enforcement action against two civil cases.

One facility remains in non-compliance more than 341 days after the inspection while the second facility took 577 days to reach compliance after the initial inspection.

## **BACKGROUND**

In 1985, New Jersey was authorized for the RCRA base program. This program covered the essential core of RCRA, including the definitions of solid and hazardous waste; procedures for obtaining permits; and the standards governing generators and transporters of hazardous waste and treatment, storage, and disposal facilities (TSDFs). In 1988 and 1994 the authorized State program was expanded by a small number of additional RCRA and new Hazardous and Solid Waste Act (HSWA) regulations.

Because New Jersey's RCRA regulations were more stringent than the Federal program, the Governor directed NJDEP to develop regulations more in line with the Federal program. As a result, in 1994 New Jersey advised the Region of its intent to repeal its existing hazardous waste regulations and enact a new hazardous waste program by incorporating the Federal RCRA regulations by reference. Originally, this program was scheduled to sunset in October 1995.

In early 1995, senior Region 2 officials stated they were in contact with New Jersey officials about the problems that would have been encountered had the program sunset in 1995. Particularly, State hazardous waste laws would have lapsed. This would have had devastating consequences because neither EPA, New Jersey, nor its citizens would have been able to enforce RCRA regulations. As a result, the Governor, by Executive Order, extended the RCRA State regulations for one year. According to

Region 2, insuring that State hazardous waste regulations were on the books was judged to be the most critical issue, even if (as the Region recognized) there would be a period of time before EPA could enforce some of them.

On October 21, 1996, the State repealed the authorized State program and adopted the "New State Program." Also, in October 1996, the State applied to EPA for reauthorization of the RCRA base program and authorization of HSWA corrective action programs. As of June 1999, EPA had not reauthorized New Jersey's RCRA base program.

In order for a State to be reauthorized, a completed application package must be submitted and approved by EPA. The application package must include a Final Memorandum of Agreement (MOA) acceptable to EPA, an Attorney General Statement, and a Program Description (including name and program changes).

According to 40 CFR §271.20 (d):

Within 90 days from the date of receipt of a complete program submission for final authorization, the Administrator shall make a tentative determination as to whether or not he expects to grant authorization to the State program . . . The Administrator shall give notice of this tentative determination in the FEDERAL REGISTER . . .

The CFR further provides that the public will be afforded 30 days after the notice to comment on the State's submission and tentative determination. The EPA Administrator shall make a final determination within 90 days of the public notice.

**UNWARRANTED  
DELAYS**

NJDEP showed a lack of commitment and cooperation in obtaining speedy approval of its new RCRA program by failing to respond timely to Region 2's effort to resolve concerns regarding NJDEP's application package. Region 2 allowed NJDEP to delay the application process by not timely elevating action to a higher management level.

Regional RCRA officials stated that NJDEP submitted an incomplete application to Region 2 in October 1996. According to 40 CFR §271.5 (b), "Within 30 days of receipt of a State program submission, EPA will notify the State whether its submission is complete." The RCRA Program Chief said NJDEP was verbally notified soon after the application was submitted that it was not acceptable. However, Region 2 did not write of its concerns with NJDEP's proposed closure activities and corrective actions until March 1997, well beyond the 30 day time limit. (In the future, the Region should consider documenting their initial determinations.) Another letter was sent to NJDEP in May 1997 which stated, "Closure is an important element of the RCRA program and NJDEP needs to resolve these issues prior to re-authorization of the base program." The Region indicated that it did not perceive closure as a significant issue until January 1997.

Since Region 2 had not received NJDEP's written response to either of the above letters, the Regional Administrator (RA) wrote to the NJDEP Commissioner on September 8, 1997 outlining the issues which impeded reauthorization of NJDEP's RCRA base program. Neither the NJDEP Commissioner nor his staff responded in writing to the RA's letter until June 24, 1998 when NJDEP's Assistant Commissioner,

Site Remediation Program wrote to Region 2's Director, Division of Environmental Planning and Protection (DEPP).

After the RA's September 1997 letter, NJDEP's Director, Division of Responsible Party Site Remediation responded on October 22, 1997 to Region 2's Director, DEPP. However, the issues raised in the letter did not address the RA's letter but rather the May 1997 EPA letter. The letter acknowledged the need to develop a strategy for issues raised in the May letter. However, no action had been taken at this point, more than five months after EPA sent its May letter. Other correspondence between the two agencies followed, none of which addressed the RA's letter.

These delays negatively affected EPA because the Region was without its enforcement authority during this period. It was not until January 1998 that the Deputy RA was advised that the Region lacked enforcement authority while New Jersey's base program remained unauthorized. After being advised of the situation, the Deputy RA became frustrated with New Jersey and resolved that he would not let this reauthorization issue continue much longer.

In our opinion, the State's actions showed that obtaining EPA's approval of its new RCRA base program was a low priority. NJDEP, unlike the Region, was not being impacted since it was still able to execute its full enforcement powers. However, the U.S. Attorney and Federal investigators were extremely frustrated in their attempts to bring serious RCRA violators to justice.

Unfortunately, Region 2's responses did not persuade NJDEP to complete an acceptable

application package in a timely manner. Negotiations stagnated at the Division Director level. We believe that a more vigorous response from the RA's Office was needed. Also, the Region never proposed to use such sanctions as withdrawing authorization or grant funds. While EPA's philosophy was to work with States on a partnership basis, the State was not responsive to EPA's needs especially when such a vital activity as EPA's enforcement authority was at stake.

**Issues Causing  
Delays**

For more than two years, EPA and NJDEP disagreed on three main issues in developing the MOA. These issues were NJDEP's need to:

- (1) establish a RCRA Coordinator position to input RCRIS data and track closures;
- (2) prepare a closure strategy; and
- (3) include public participation under corrective action plans.

On September 11, 1998, Region 2 and NJDEP held a teleconference to finally iron out their differences. Region 2's RCRA Program Chief said there was "conceptual agreement on all issues." Based upon these agreements, NJDEP submitted its "final" application to Region 2 in January 1999. Details regarding the agreement on each of the three issues follow:

1. NJDEP agreed to hire a RCRA Coordinator and this agreement will be included in the MOA. According to Region 2's RCRA Program Chief, previously, NJDEP did not realize the need for a coordinator.

2. Rather than include the closure strategy in the MOA, EPA agreed to allow NJDEP to submit the strategy under separate cover on a date of the State's choosing. The State chose to submit this strategy in March 1999, two months after submitting its "final" application.
3. NJDEP decided to forgo the corrective action issue under HSWA. NJDEP had never been authorized for this program and decided to postpone authorization until a later date. Therefore, the MOA did not need to address the issue of public participation.

These major issues which the Region claimed delayed reauthorization were eventually either dropped, addressed under separate cover, or agreed upon. In our opinion, these issues were not so insurmountable that the Region and State could not have reached a quicker resolution. Again, we point to the fact that during this period EPA basically was stripped of one of its fundamental powers, RCRA enforcement in New Jersey. Such a loss was not justified considering the potential harm to the public and environment as illustrated by the following cases.

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## **CRIMINAL IMPACTS**

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For more than two and a half years the Region's enforcement program was debilitated. There were at least five criminal cases which could not be prosecuted under RCRA. Two cases had to be dropped by EPA and referred to the State. One other case may be prosecuted under a different law if the Assistant U.S. Attorney is successful. The remaining

two cases may be dropped altogether since there are no other alternatives to prosecution under RCRA. Details of these five cases follow:

**Case 1**

A major oil refinery (located in close proximity to a residential area) disposed of RCRA wastes since World War II. As a result, there was contamination from reactive chemical wastes in a lagoon. Federal and State law required the facility, which was closing down, to clean up the wastes. The facility declared the waste non-hazardous and contracted a clean-up company to dispose of the wastes. After some of the waste had been hauled to an out of State landfill, the clean-up contractor realized that this was RCRA hazardous waste. The contractor contacted EPA's Criminal Investigations Division (CID), which then obtained a search warrant and gathered evidence. The Federal Bureau of Investigations (FBI) was also involved in this case. However, lacking Federal enforcement authority, neither CID nor the FBI could pursue this case. CID referred the case to the State which continued to pursue this matter.

**Case 2**

A chemical repackaging company (located in the middle of a lower income neighborhood) committed RCRA storage violations and contaminated a water table. This company bought chemicals in bulk (i.e. tanker full) and repackaged them into smaller containers (i.e. gallon containers). However, some of these chemicals could not be used for resale. The unused portion of the chemicals remained on site for years which is a RCRA storage violation. The drums or storage containers holding the chemicals eventually started to leak into the water table. Since there was a joint interest in this case, EPA brought in the State. However, the local District Attorney must prosecute this case because it cannot be Federally enforced.

**Case 3**

A small paint manufacturer committed RCRA disposal violations involving paint waste and solvents used to clean equipment. The facility owner, who had been on site since 1965, stored the flammable solvents in drums and buried them in the back of his property (approximately 6-7 acres). The Assistant U.S. Attorney was forced to pursue prosecution of this case under a different authority (i.e. CERCLA). If this case is not successfully prosecuted under CERCLA, it will not be referred to the State. According to CID, the State had reviewed this case a couple of times over the past few years but did nothing about it.

**Cases 4 & 5**

Two small companies which went out of business abandoned hazardous wastes on their sites. These RCRA wastes were discovered approximately a year after the companies closed. Clean-up was turned over from the State to EPA because the clean-up costs were too high for the State. Although RCRA was the regulatory authority covering these cases, the Assistant U.S. Attorney had to examine different regulatory authorities (i.e. CERCLA or the Clean Water Act) for prosecution. Therefore, EPA used its resources to clean up a site for which they were unable to criminally prosecute.

These five cases represent the Region's current enforcement difficulties. However, until NJDEP's new program is authorized, additional violations may be discovered related to this time frame (from October 1996 thru EPA program approval date). EPA will face the same enforcement dilemma of how to pursue these cases.

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**CIVIL CASES**

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EPA's limited enforcement authority in New Jersey also affected how the Region addressed civil as well

as criminal cases. Prior to New Jersey seeking reauthorization of its new base RCRA program, Region 2 had the ability to take formal enforcement action against RCRA violators in New Jersey. Until the new base program is approved, Region 2 must now refer formal enforcement action to NJDEP and has done so. (Formal enforcement action is taken against facilities which caused actual exposure or a substantial likelihood of exposure to hazardous waste or are chronic or recalcitrant violators.) The following two cases describe the limit of Region 2's actions against these violators.

**Case 1**

This facility was issued a Notice of Violation (NOV) regarding the status of old process equipment and poor waste handling. Although Regional personnel considered this facility a Significant Non-Complier (SNC), they had to delay drafting the compliance order because the Office of Regional Counsel (ORC) was investigating regulations that could be cited in the compliance order regarding waste mismanagement. However, ORC decided not to issue the complaint.

In the meantime, more than 266 days passed since the inspection was performed, the facility continued to be in non-compliance, and formal enforcement was not issued by the Region. Subsequently, this case was referred to New Jersey for enforcement action. As of December 22, 1998, New Jersey had not acted upon the referral and the facility had remained in non-compliance, more than 341 days after the inspection. However, in March 1999, NJDEP issued an administrative order based on EPA's referral and NJDEP's subsequent inspection. This was more than 13 months after the inspection.

**Case 2**

This facility's February 21, 1997, inspection disclosed a failure to: (a) maintain a contingency plan, (b) close storage containers, and (c) retain on-site for at least five years a copy of all documentation concerning hazardous waste sent to off-site TSDFs. The Region's April 29, 1997, NOV was issued timely. The facility requested and was granted an extension but failed to respond. On October 7, 1997, the Region then issued a §3007 information request letter. The facility's November 17, 1997, response was deemed inadequate. On February 2, 1998 the Region issued a combined §3007 letter and NOV. The facility's November 4, 1998, response to the combined §3007 letter and NOV was finally accepted on November 27, 1998 bringing the facility into compliance, 577 days after the inspection.

Explaining why it took the Region so long to resolve this case, the DECA Section Chief said this facility "fell from his radar screen." Because Region 2 lacked enforcement authority, the case could have been referred to NJDEP. However, the State would not have taken enforcement unless they conducted their own inspection. Therefore, such a referral would not have necessarily saved time. The Section Chief added that, regardless of the status of the Region's enforcement authority, he would not have escalated enforcement action to the formal level. He believed the violations were not serious enough to warrant formal enforcement and the facility should be given a second chance. The Region 2 Inspector said "We regret that it took almost a year and a half longer than usual to resolve this matter."

Although the violations cited may not have been highly significant, we believe that the case should have been referred to the State in a timely manner for appropriate action.

**Additional Cases**

The DECA Section Chief stated that besides the two aforementioned civil cases, at least one other case (a dry cleaner) had to be referred to NJDEP for followup actions. The potential for identifying other similar cases remains until NJDEP's new base program is authorized.

**CONCLUSION**

Not only has EPA's authority to protect the environment been compromised, but serious RCRA violators continued to harm the environment with impunity. EPA has ultimate responsibility for assuring that Federal regulations are implemented. However, without full enforcement authority, EPA cannot carry out this important mandate. One significant benefit to EPA enforcement authority is that it serves as an objective counterbalance to the States' enforcement authority. As we have presented through the case studies, environmental pollution continued unabated until a suitable enforcement authority could be determined. Compliance was not achieved in the shortest period of time and some companies which violated RCRA regulations were not held accountable. Such companies might gain an unfair economic advantage over other law-abiding competitors.

The difficulty in attaining reauthorization eroded the partnership relationship between EPA and the State of New Jersey. Each Agency was no longer on an equal footing. The Federal government must hope that the State would take appropriate enforcement action once a case was referred. If not, the Federal government had limited recourse.

While Region 2 could refer violators to the State for enforcement, this established an undesirable precedent and decreased program efficiency. Other States might view NJDEP's strategy of delay as a successful means to circumvent Federal environmental law particularly since the Region did not effectively resist. Referring cases to the State was not an efficient stopgap since the State would not issue an enforcement action without conducting its own inspection. Valuable time would be lost, and significant violators would continue to pollute unabated.

#### **UPDATE**

NJDEP finally submitted a final application package to EPA on January 14, 1999, **almost two and one half years after initially applying for reauthorization, and almost five years after first announcing its intention to establish a new base program.** A public notice and comment period will still be required after EPA's acceptance of this application. According to Region 2, this should take approximately 45 days. If there are no comments, the program can finally be authorized. However, if there are public comments, additional time will be required to address and evaluate these comments. It should be noted that on April 19, 1999 the Acting RA signed the proposed approval document. On May 11, 1999, Region 2 finally published the proposed rule in the Federal Register. Comments must be received by June 10, 1999. Regional officials advised that no public comments were received, therefore a final Federal Register notice must be published.

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#### **RECOMMENDATIONS:**

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In the future, should a state notify EPA of its intention to repeal its RCRA program, we recommend that the Regional Administrator:

1. Develop a process which would endeavor to avoid a lengthy period where EPA's civil and/or criminal enforcement authority would be adversely affected. The process should consider:
  - (a) Establishing reasonable time frames for the State's submission of a complete, formal authorization application;
  - (b) Developing procedures to expedite enforcement referrals to the State until reauthorization is formally approved. The procedures should outline necessary documentation the State requires to avoid reinspecting a facility before it initiates formal enforcement action;
  - (c) Elevating the reauthorization discussions to a higher management level including the Regional Administrator for more aggressive actions if delays are encountered at the program level;
  - (d) Withdrawing partial or complete State authorization or suspending/withdrawing Federal grant funds if the State does not submit a complete application and timely respond to specific EPA concerns.
  
2. Complete the remaining steps for approving NJDEP's new base program in accordance with the time frames established by 40 CFR §271.

3. In conjunction with NJDEP, implement an expeditious referral procedure so that any current or additional cases identified can be timely enforced by the State until Region 2 regains its enforcement authority.

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**REGIONAL RESPONSE**

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Region 2 described the draft report as “inaccurate in its recitation of the history of RCRA reauthorization in New Jersey in that it does not acknowledge many early Regional efforts to bring problems to the State’s attention, nor does it place in a larger context, many of the activities occurring during the 1996-1999 period.” Additionally, NJDEP did not submit a complete draft application in October 1996.

Region 2 believed the OIG overstated the environmental consequences. “The assumption that companies were able to break the law ‘with impunity’ is wrong.” Also the Region could have issued a unilateral order even if a particular prosecutor concluded that a Federal criminal prosecution was problematic. In addition, expeditious referrals of criminal investigations were made to the State (Case 1 was referred within 3 weeks and County prosecutors were involved with Case 2 within 3 days of learning of the matter). Moreover, New Jersey’s enforcement actions were generally timely and appropriate. As a result the concerns raised in the report “seem overdrawn.”

Regarding civil case number 1, the Region said, “The State did not need to conduct its own inspection. It should be noted that this information was provided to the OIG but the OIG incorrectly states, on page 18, that NJDEP had not yet acted on this referral.”

Finally, the Region stated the draft report overlooked the larger context of the issues surrounding RCRA reauthorization in New Jersey which made prompt resolution difficult.

Region 2 agreed with a number of the report's recommendations and believed it had implemented many of them. The Region believed that earlier written communication of the enforceability concerns to the Regional Administrator and the Criminal Investigations Division might, in hindsight, have been advisable. However, it considered, but did not adopt the other recommendations and believed their adoption would not have reduced the difficulty experienced during the reauthorization process. Specifically:

Recommendation #1: The Region was aware in advance of NJDEP's sunset program and a schedule had been discussed for submission of a program approval application. However, there were unforeseen complexities which impacted the schedule. Additionally, a requirement was incorporated in the new MOA to notify EPA in advance of proposed changes.

Recommendation #2: The Region agreed with the recommendation and stressed that the 90 day deadline commences when the Region receives a complete program submission, in this case January 14, 1999. The Region expects public notice of its proposed application approval in May 1999.

Recommendation #3: The Region believes it is referring cases in a timely manner and will continue to do so.

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**OIG COMMENTS**

The draft report highlighted the significant events pertaining to the reauthorization issues. During the 1996-1999 time period the OIG agrees that additional activities took place (i.e. meetings) to discuss this matter. However, the meetings apparently did not expedite the reauthorization outcome. Additionally, we were not made aware that New Jersey's program was scheduled to sunset in October 1995. However, this shows that the Region knew about the impending reauthorization problems at an earlier date but took even longer to resolve the issues.

The response stated that NJDEP did not submit a draft application in October 1996. However, Region 2 RCRA officials stated that NJDEP "applied for reauthorization in October 1996." Regardless of whether a complete draft application was submitted in October 1996, the fact remains that most issues which impeded the reauthorization process were known when the State repealed its program. Yet, it took more than two years to resolve those issues and for NJDEP to submit the January 14, 1999 formal application.

The OIG did not overstate the environmental consequences. We believe that hazardous waste drums which were improperly stored, inappropriately handled, and leaking posed a threat to the environment. Such conditions represented violations of the RCRA law. In case 1, the violator did not identify its waste as hazardous. Subsequent handlers of this improperly identified waste could have inadvertently caused an accident. Federal law enforcement officials were pursuing these cases because the companies violated environmental laws meant to protect the public and the environment. All criminal cases were discussed with the assigned

investigators and the Assistant U.S. Attorney. Since investigators were willing to pursue these cases, the OIG believes there were significant environmental consequences.

The Region argued that companies were punished or penalized during the reauthorization delay through NJDEP's enforcement actions. However, there will be no referral for State enforcement action for three of the five criminal cases. The Assistant U.S. Attorney researched different regulatory authorities which might be used for prosecution of these Federal cases. Unfortunately, if these cases are not prosecuted under these different authorities, they will not be pursued. Therefore, we believe that certain companies harmed the environment with impunity. The State had previously looked into one of the cases but took no enforcement action.

Although some of these criminal cases might have been timely referred to the State, this should not have been necessary since the Federal government should have been able to prosecute these cases. When Federal investigators spend time and effort in gathering the evidence, the next course of action naturally is Federal prosecution. In one case, even the FBI discontinued its investigation. Speedy referrals to the State does not change the fact that EPA was stripped of one of its fundamental powers - enforcement.

For civil case number 1, an e-mail from the DECA Chief stated, "NJDEP in early March also issued an administrative order to [company name deleted] based on our referral to them and their own follow-up inspection [emphasis added]. As you know, [company name deleted] was one of the two SNC cases that we couldn't take action against because of

the lack of authorization. They imposed a penalty of \$5,000." This penalty was issued more than 13 months after EPA's January 15, 1998 inspection.

The following comments address the Regional responses to specific recommendations.

Recommendation # 1: The OIG strongly believes that a formalized process is necessary and should be implemented should a similar situation occur in the future. Consideration should be given to the four components of this recommendation as well as reasonable time frames for completion. The response indicated that the Region "discussed" a schedule for NJDEP's submission of a program approval application, but the schedule "unraveled". This action as well as the lengthy delays clearly shows the need for a more formal process to ensure more timely resolution of the issues. We agree that initiating program withdrawal might have been disruptive and burdensome. However, from October 1996 to the present, Region 2's inability to enforce certain RCRA regulations actually caused disruptive and burdensome problems which might have affected public health and the environment.

Recommendation # 2: We were advised that the Regional Administrator tentatively approved NJDEP's final application on April 19, 1999 and the notice was published in the Federal Register on May 11, 1999. The Region should complete the remaining steps (i.e. evaluating the public comments and final approval) as soon as possible.

Recommendation # 3: Two of the sixteen New Jersey civil cases sampled were not referred to the State in a timely manner. Based on our limited review, we don't know how many other cases fall into this area. The

OIG strongly believes that formal procedures should be implemented to timely refer enforcement cases to the State. When a case could no longer be actively pursued because of the reauthorization issue, the Region should initiate a quick referral to the State.

\* \* \* \*

In conclusion, we believe the Region's response overlooked the larger issue of EPA's loss of its enforcement powers. The Region's concerns tended to focus on meetings and correspondence over the two and one half years which were not mentioned in the report. During this period EPA had to rely on the State to take enforcement action on Federal cases. EPA's mission statement states that EPA's purpose is to ensure that Federal laws protecting human health and the environment are enforced fairly and effectively. For over two and one half years EPA was not able to fulfill this mission for certain Region 2 RCRA violators.

Region 2 was also very concerned about the reauthorization delays and the "current impairment of RCRA enforcement with the State". A January 22, 1998 ORC memo outlined the reauthorization history and obstacles. Specifically, it stated:

1. The New State Program remains unauthorized. This has created severe problems for the enforcement of RCRA by EPA, within the State.
2. The State's repeal of the State Program and the failure to authorize the new State Program has severely impaired the Region's ability to enforce RCRA within the State, both civilly and criminally.

3. NJDEP, unlike the Region, is not being hurt due to the lack of authorization for the New State Program. The States' bureaucracy has no interest in authorization, or at least is in no hurry to obtain it.

These statements by the Regional attorney clearly show the numerous reauthorization problems and concerns that the Region could not enforce specific RCRA regulations. Therefore, we believe that our serious concerns about this matter were not alarmist, inaccurate, or overdrawn.

## **CHAPTER 3**

### **IMPROVEMENTS NEEDED IN REGION 2'S IMPLEMENTATION OF THE RCRA ENFORCEMENT PROGRAM**

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Although Region 2's implementation of the RCRA enforcement policy generally complied with Agency guidelines, improvements were needed to assure that all enforcement procedures were in accordance with the March 15, 1996 Enforcement Response Policy (ERP). Region 2 generally issued appropriate enforcement actions for violators in the State of New York. However, Region 2 needed to improve its timeliness to comply with the ERP time frames of making enforcement decisions within 90 days and to document its justification for the delay in issuing formal enforcement actions. Additionally, Region 2 needed to document and conduct more timely followup on facilities' return to compliance.

The lack of guidelines and documented time frames for issuing RCRA §3007 Information Request Letters and NEIC's untimely inspection reports caused the Region to miss the ERP's established time frames. Also, the Region did not utilize RCRIS as a tracking system to ensure that facilities returned to compliance on a timely basis.

As a result, facilities were not always returned to compliance as quickly as possible and RCRA program resources were not used efficiently to carry out program goals. Also, facilities may not have been treated consistently and violators may have received an unfair economic advantage.

**UNTIMELY ENFORCEMENT  
ACTION**

Our review of 31 judgmentally selected files disclosed that Region 2 did not determine the appropriate enforcement action for 7 of 15 sampled New York facilities and 2 of 16 sampled New Jersey facilities within 90 days of inspection as provided by the ERP. Additionally, formal enforcement was not always taken within 180 days in accordance with the ERP. Untimely enforcement resulted from coordinating multi-media enforcement efforts, the “routine” use of §3007 Information Request Letters, and late inspection reporting by NEIC.

**Enforcement Determinations  
Took More than 90 Days**

The following table identifies the nine cases where Region 2 did not decide appropriate enforcement action within 90 days. Appropriate enforcement actions took between 106 and 476 days.

No	Facility	Inspection Date	ERP Time Frame To Determine Action	Days Elapsed	Type of Action Issued
1	NY6*	07/17/98	90	173	No action issued as of 1/6/99
2	NY7*	05/05/97	90	296	Complaint
3	NY9	10/30/97	90	106	NOV
4	NY10*	04/24/95	90	387	Complaint
5	NY13	02/14/97	90	376	NOV
6	NY14*	03/04/97	90	476	Complaint
7	NY15	05/29/96	90	370	NOV
8	NJ6*	10/19/95	90	120	NOV
9	NJ7	11/17/97	90	191	NOV
* RCRA § 3007 Information Request letters					

**Formal Enforcement Not  
Issued in 180 Days**

The following table identifies three cases where Region 2 did not take formal enforcement within 180 days as provided by the ERP.

<b>Facility</b>	<b>Inspection Date</b>	<b>Days Elapsed</b>
<b>NY7</b>	<b>05/05/97</b>	<b>296</b>
<b>NY10</b>	<b>04/24/95</b>	<b>387</b>
<b>NY14</b>	<b>03/04/97</b>	<b>476</b>

The RCRA Compliance Branch Chief stated that for NY7 the delay was the result of coordinating a multi-media enforcement effort. Time was lost waiting for other program information. Also, the ERP allows 20 per cent of a year's cases to exceed the standard response times because of unique factors.

We found another case delayed by a multi-media effort. Region 2 initially contemplated issuing formal enforcement action against case NY13. The Inspector believed multi-media issues existed based upon the results of his February 14, 1997 inspection. He referred the case to the Multi-media Committee but the multi-media inspection was not conducted until December 1997. The response from a §3007 Information Request Letter showed that a formal action was not appropriate. An NOV was finally issued for RCRA violations on February 25, 1998, 376 days after the initial RCRA inspection. The Inspector explained that the delay was the result of

trying to coordinate with the multi-media inspection. He said that while delays were expected, the process should not have been delayed by more than a month or two.

The ERP states that:

In cases where response times will be exceeded due to case specific circumstances, the implementing agency must prepare a brief justification for the delay and develop an alternative schedule for case resolution.

Our file reviews did not disclose any documentation justifying why ERP time frames were not met or an alternative schedule for case resolution.

**Utilization of RCRA §3007  
Information Request Letters**

We found four New York cases and one New Jersey case where the Region's utilization of RCRA §3007 Information Request Letters caused considerable delay in issuing an enforcement action. Although the purpose of the letter was to obtain additional documentation not available during the inspection, Region 2 used the letter to get the company to implicate itself and to assure they "get it right."

The following table illustrates that by the time Region 2 issued §3007 letters and allowed a 30 day response, almost 90 days had elapsed. This procedure as implemented made it difficult for the Region to meet the ERP's 90 day time frame to determine appropriate enforcement action.

Facility	Inspection Date	§3007 Letter Issued	Days Elapsed
NY6	07/17/98	09/10/98	55
NY7	05/09/98	07/01/98	53
NY10	04/24/95	07/08/95	75
NY14	04/04/97	04/21/97 07/07/97 10/16/97	17 125 225
NJ6	10/19/95	12/12/95	54

RCRA officials advised that supervisors normally give about two weeks to prepare §3007 letters after the inspection report is finalized. However, as the above schedule shows, it has taken between 17 and 75 days to issue the §3007 letters.

RCRA §3007 states that:

Any person who generates, stores, treats, transports, disposes of, or otherwise handles hazardous waste, shall upon request of any officer or representative of EPA, furnish information relating to such waste and permit.

RCRA staff stated that Information Request Letters were issued because they wanted the facilities to respond in writing. It was easier to take enforcement if a facility owner admitted to certain practices. Also, facilities might be requested to analyze waste to determine whether or not it was hazardous. The DECA Section Chief stated that Regional attorneys believed Information Request Letters were more enforceable than an NOV, and they could pursue a

facility for failure to respond to a §3007 letter but not an NOV. He also stated the Region attempts to give a facility two chances to come into compliance before a formal complaint is filed, and the issuance of the §3007 letter is one of those chances.

While the Region can take enforcement action against a facility for failing to respond to a §3007 letter but not an NOV, such enforcement would only pertain to responding to the §3007 letter and not to the potential facility violations. However, the Region would probably continue to pursue enforcement for facility violations rather than for not responding to a §3007 letter. Also, routinely giving potential violators a second chance was not required by regulations and did not assure that violators were returned to compliance as soon as possible. Information Request Letters may be necessary in some cases. However, in our opinion, issuance of such letters in some cases was a duplication of effort and caused unnecessary delay in issuing enforcement documents. We believe Region 2 needs to re-evaluate their use to assure that the letters are used efficiently.

The following three examples illustrate how the use of Information Request Letters delayed the issuance of enforcement actions.

In case NY14, three different Information Request Letters were issued before the formal complaint was finally issued (476 days after the inspection). The ERP required the Region to issue formal enforcement in 180 days. This facility was cited for 12 counts of violations which included offering hazardous waste to unauthorized entities on two occasions, and shipping hazardous waste without a manifest. The Inspector

stated that issuing three letters was unusual, however ORC wanted the third letter sent.

In two cases (NY10 and NY6), the Region's §3007 letters requested information previously observed during the inspection. For example, the Inspector noted there was no internal communication or alarm system. However, the §3007 letter asked the facility, "Does the hazardous waste storage area have a telephone or communication or alarm system? If so please describe it and when it was installed. It was not available during the time of inspection." We believe sending §3007 letters caused delays in issuing enforcement actions. For NY10, a Complaint was not issued until 387 days after the inspection and for NY6, an enforcement action was not issued as of January 16, 1999, 173 days after inspection. Proceeding in this manner is a duplication of effort which increases the time before any enforcement action might occur. This additional time can give a violator an unfair advantage over complying facilities and delay return to compliance.

The Region needed to develop guidelines or procedures that included when it was appropriate to use a §3007 letter as well as to establish time frames for sending the letters. These guidelines should allow the Region to meet the ERP time frames for timely enforcement. The §3007 letter did not require a facility to correct known violations, but only to respond to questions. While waiting for the facility to respond to the letter, violations such as 290 unlabeled drums, missing emergency equipment, and failure to train employees on proper waste handling procedures and emergency procedures, may go uncorrected.

We believe the Region should consider methods other than the use of the §3007 letter for obtaining information. During the inspection exit conference, Inspectors could leave written requests for additional information, or obtain statements from owners verifying operating procedures. If such information is not provided voluntarily within a specific time frame, then issuing a §3007 letter may be appropriate. This approach may not work for all instances (e.g., sampling), but we believe there could be times when such an approach could expedite the enforcement process.

**Late NEIC Reports Delayed  
Enforcement**

In two cases (NJ7 and NY15), the issuance of NOVs was delayed because the Region did not receive timely inspection reports from NEIC. NEIC issued reports to the Region six and ten months after the inspections. This caused the NOVs to be issued 191 and 370 days after the inspections. As a result, facilities were in non-compliance longer than necessary.

NEIC is the national support center for EPA's enforcement and compliance assurance program. NEIC supports the environmental enforcement community in field activities and engineering evaluations, forensic laboratory activities, information management, computer forensic, technical analysis and training, and in the courtroom. Region 2's Memorandum of Agreement (MOA) required NEIC to conduct a specific number of Region 2 inspections.

Because Region 2 received the NEIC reports so late, a decision on the appropriate enforcement action could not be made in 90 days. Since the Region's MOA had not established time frames for inspection reports, NEIC was under no obligation to issue reports expeditiously to the Region.

**INADEQUATE FOLLOW UP  
TO CITED VIOLATIONS**

Region 2 did not effectively follow up on cited violations to ensure facilities returned to compliance in four of 15 New York and eight of 16 New Jersey cases. Informal actions were issued for three of the five New York and all eight New Jersey cases; formal actions were issued for the remaining two New York cases. The number of days for these facilities to return to compliance (if they did) far exceeded the 30 days outlined in the issued enforcement action. In addition, we found very little information in the files to show that the Region was actively following up on a facility's return to compliance. As a result, violations (i.e., hazardous waste operating manual not meeting requirements of a contingency plan, failing to mark containers "Hazardous Waste," and retaining copies of manifest on file) remained uncorrected between 155 and 577 days.

The ERP provided that:

The objectives of an informal enforcement response are to compel the violator to cease its non-compliant activities and ensure that full physical compliance is achieved in the shortest time frame.

At the time a violator is formally notified of the violation determination it is given a compliance date which establishes a deadline or the violator to correct all known violations. A correction period during which the violator should correct all known problems should not exceed 90 days.

Failure to achieve full physical compliance by the compliance date or a failure to notify the implementing agency of the inability to correct

violations should result in an escalation to formal enforcement.

Even though the ERP allowed facilities a maximum of 90 days to come into compliance, Region 2 determined that 30 days was adequate and gave facilities only 30 days to come into compliance.. However, in 8 of 12 sampled cases facilities took longer days allowed in ERP to come into compliance.

The following two examples illustrate the Region's inadequate followup of facilities' response to enforcement actions.

**Case NJ1**

The Region 2 Inspector took more than a year before assuring that the facility complied with the original NOV. Region 2's April 29, 1997 NOV requested a response within 30 days of receipt of the NOV. On May 30, 1997, the facility requested and was granted an extension to June 16,1997. However, the facility never responded.

In August and September 1997, the Inspector contacted the facility about the late response to the NOV. Again, the facility did not respond. The Region then sent a §3007 letter (October 7, 1997) restating information

Date	Action
2/21/97	Inspection performed
4/29/97	NOV issued
7/2/97	Response due (include 30 day extension)
10/7/97	3007 letter issued
11/17/97	Response received
2/2/98	3007 Letter& NOV
11/4/98	Date of facility's response
11/27/98	Facility's response deemed acceptable

already requested. The inspector considered the November 17, 1997, response to the §3007 letter deficient, but did not advise the facility of the deficiency until February 2, 1998 when another §3007 letter combined with an NOV was issued. The facility did not respond to this document, and the Region did not contact the facility until August 1998.

The §3007 letter and NOV stated that failure to respond in full was a violation of RCRA and might result in Federal enforcement action pursuant to Section 3008 RCRA, 42 U.S.C. § 6928. Section 3008 pertains to Federal enforcement and includes information on compliance orders, public hearings and criminal penalties.

The Inspector stated that he was away at school from May through August 1998, and this case was not assigned to another Inspector during his absence. When he returned in August 1998, he contacted the facility and faxed them a copy of the Region's February 2, 1998, letter to them. Between August and October 1998, there was no Regional contact with this facility. The facility response dated November 4, 1998, was deemed acceptable by the Region on November 27, 1998, 577 days after the inspection was conducted. The Inspector further stated that he had a heavy workload and this case was not a priority.

The DECA Section Chief stated he uses his personal computer tracking system to track a facility's compliance, and this case "fell off his radar screen." The Region's followup actions to ensure compliance were excessively late. This facility's history of untimely response required more effective followup than the Region provided.

**Case NY9**

In this case, the Region 2 Inspector took nearly a year before assuring that the facility complied with the NOV. This facility was inspected on October 30, 1997, and an NOV was issued on February 13, 1998. The facility was cited for failure to make a determination whether its solid waste was a hazardous waste. The facility did not respond to the NOV, and there was no documentation in the file to indicate the Region attempted to contact the facility.

A December 4, 1998, re-inspection of the facility (more than one year after the original inspection) disclosed that it was in compliance. On December 8, 1998, 298 days after the enforcement action was issued, the facility finally responded to the NOV.

The Inspector stated because of a heavy workload the enforcement action was issued late. In addition, because this was a small facility, they made a conscious decision to wait a year before reinspecting the facility. There was no information in the file to show the Region 2 decision not to follow up on this facility. Failure to follow up on known violations because a facility is small sends the wrong message to the regulated community and gives the perception that EPA does not deal with all facilities or all violators equally. Without adequate followup, facilities will not seriously acknowledge EPA's enforcement.

These cases illustrate the need for an effective tracking system to assure that facilities are complying with enforcement orders and returning to compliance. The Region also needs to document in the files follow up efforts. RCRIS can provide the tracking system needed. See Chapter 4 for more details regarding the Region's use of RCRIS.

## **CONCLUSION**

Region 2 generally took the appropriate level of enforcement. However, the Region had not provided adequate assurance that violators received the appropriate level of enforcement within the recommended time frames, and that violators returned to compliance in a timely manner. These weaknesses must be addressed to assure that violations do not continue for an unreasonable amount of time and that facilities are treated fairly. In some cases, the Region's need for additional information or coordination with other media may justify exceeding the ERP time frames. However, in such cases the Region needs to provide adequate justification for an appropriate alternative time frame and comply with it. The Region should also make greater use of RCRIS as a tracking system so that the time frames are followed.

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## **RECOMMENDATIONS**

We recommend that the Regional Administrator instruct the DECA Chief to:

1. Consistently follow the ERP time frames in determining appropriate enforcement actions or provide adequate justification for not meeting the time frames.
2. Establish and implement time frames for coordinating multi-media enforcement cases.
3. Establish written time frames for issuing §3007 Information Request Letters.

4. Consider methods other than the use of §3007 Information Request Letters for obtaining information to expedite the enforcement process.
5. Establish time frames in the MOA with NEIC for submission of inspection reports.
6. Utilize the RCRIS data base to track facilities' compliance with enforcement actions.
7. Document the Region's followup of facilities in non-compliance.

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**REGIONAL RESPONSE**

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Region 2 provided general as well as specific comments on individual cases and recommendations.

Region 2 stated that three of the nine untimely cases resulted from factors (i.e., untimely NEIC reports and multi-media complications) outside the RCRA Enforcement Program. The ERP provided for a ceiling of untimely cases at 20 percent for each year. Region 2 agreed that for such cases they did not document justifications for exceeding ERP standard response times nor establish alternative time-frames for taking action. However, it plans to do so in the future. The Region also agreed that in the future it would issue NOVs with the § 3007 letters for inspection violations. Therefore, violations would be corrected while information to support formal action was obtained.

Region 2 stated that with respect to giving companies two chances to comply as noted by the OIG, these

two chances refer to responding to § 3007 letters. Region 2's practice was to allow a company a second chance to provide requested information before initiating formal action. The Region believes an Administrative Law Judge (ALJ) will not be sympathetic to a company given two chances, whereas the ALJ might be unsympathetic if EPA took action after only one attempt to obtain information.

Region 2 argued that although its NOV required compliance within 30 days, the ERP allowed up to 90 days and this should be the standard. However, it agreed that many files did not document the granting of additional time for compliance and would begin providing this documentation in the files.

The following section presents the Region's comments on specific cases.

**NY10**

The second inspection date should have been used since the decision to issue a § 3007 letter was made after this inspection. Accordingly, it took 31 days to issue the § 3007 letter after this inspection not 75 days as indicated by the OIG.

**NY4**

The wrong compliance date was entered in RCRIS (correct date was September 11, 1998). Therefore, compliance was achieved in 50 days.

**NJ16**

The wrong compliance date was entered in RCRIS (correct date was April 22, 1998). Therefore, compliance was achieved in 22 days.

**NY3**

The facility had responded to the NOV in a timely manner and hired a hazardous waste transporter, but the specific hazardous waste facility was not disclosed. Therefore, the inspector involved did not

deem the company in compliance until this information was provided.

**NY14**

Actual compliance was achieved prior to the effective date of the Final Order.

**NJ8**

This case was referred to NJDEP after Region 2 determined it could not take formal action. Therefore, the facility did not remain out of compliance because of a lack of effective follow-up and tracking.

This section provides the Region's comments on our recommendations.

**Recommendations**

Region 2 generally agreed with Recommendation No. 1.

Regarding Recommendation No. 2, the Region indicated it established and implemented time frames for multi-media enforcement cases. Specifically, the Multi-Media Enforcement Steering Committee meets each month to identify, coordinate, manage and expedite all multi-media enforcement.

For Recommendation No.3, Region 2 stated its guidelines provide that if a possible SNC was identified during an inspection, then a § 3007 letter should be issued. The letter should be drafted within two weeks after issuing the inspection report and another week for the concurrence process. The actual time might be shorter depending on inspector workload.

With respect to Recommendation No. 4, pertaining to alternative methods to obtain information in support of a formal enforcement action, Region 2 believed that regular use of § 3007 letters resulted in stronger enforcement cases. In the future Region 2 would

issue NOVs documented during inspections. In this way violations would be corrected while information needed to support a formal action was obtained.

On Recommendation No. 5, the Region stated that establishing time-frames in the MOA with NEIC for submitting inspection reports was raised nationally a few years ago but not resolved. Although Region 2 established time-frames for NEIC reports on specific inspections, actual report submission was under NEIC's control.

The Region did not comment on Recommendations No. 6 and 7.

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**OIG COMMENTS**

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We concur with the Region's corrective action to document justifications for exceeding ERP time-frames and establishing alternative time-frames.

We believe that in certain instances, Region 2 was overly cautious in allowing violators a second chance to respond to §3007 letters. Region 2 stated that it could impose statutory sanctions if violators did not respond to the letters. Additionally, it stated that the §3007 letter was a formal request which commands a company's attention in way that an informal request cannot. Since a §3007 letter is a formal request backed by statutes, we believe an ALJ would support the Region's first request. In our opinion, allowing a second chance takes away from "commanding" a company's attention.

Even though the ERP allowed facilities a maximum of 90 days to come into compliance, the Region could and has determined a lesser time-frame. Regional enforcement actions gave facilities only **30 days**. We

therefore believe it was appropriate to measure the length of time a facility took to achieve compliance against the time stated in the Region's enforcement actions.

Our comments regarding the specific cases follow.

**NY10**

The ERP defines the evaluation date as the **first day** of any inspection or record review during which a violation is identified regardless of the duration or stage of the inspection in which the violation is identified. Therefore, we continue to use the first inspection as the evaluation date.

**NY4**

RCRIS reported two violations against this facility with only one violation as achieving compliance on September 1, 1998. The Inspector stated that the facility's September 1, 1998 response was inadequate for one violation and he was planning a re-inspection of this facility. Therefore, the facility had not fully returned to compliance because all cited violations had not been corrected.

**NJ16**

The August 11, 1998 RCRIS printout showed a February 23, 1998 inspection with no scheduled or actual compliance dates entered. An October 6, 1998 note in the file showed the Inspector called the facility about their response. The facility's April, 22, 1998 response was faxed to the Region on October 6, 1998. The Region was obviously unaware of the facility's compliance status prior to October 1998. This facility was an example of inadequate follow-up because it took the Region more than six months to follow-up on their response.

**NY3**

The Regional files did not document that the facility responded in a timely manner to the NOV. The Region did not seek the facility's response until seven

months after the NOV due date. The inspection was performed on March 4, 1998. A March 10, 1998 note to the files stated the facility operator informed EPA of the two companies which transported and accepted the facility's solid waste. The note also stated that the Inspector's review of the RCRIS database disclosed that neither facility was permitted to transport nor accept hazardous waste. Therefore, an April 3, 1998 NOV was issued requiring the facility to respond within 30 days. During our December 1998 site visit, we noted no facility response to the NOV nor documentation of Regional follow-up until December 8, 1998 when the Inspector called the facility. The facility informed the Inspector that a response had been sent to EPA. However, the only response on file was dated December 9, 1998 (250 days after the inspection).

**NY14**

Although the facility may have achieved compliance prior to issuing the final order, Region 2 spent a considerable amount of time completing its enforcement efforts. While additional time might have been needed to enforce this case, no documentation was available showing that the Region had planned an alternate time frame. The issuance of three §3007 letters delayed enforcement. As a result, the Region could not determine appropriate enforcement within 90 days nor issue a formal enforcement action within 180 days. Without evidence of an alternative schedule, we don't know if another time frame was proposed. We believe a planned, alternative schedule could have helped the Region use its resources more effectively.

**NJ8**

We found no evidence to show that the Region followed-up to determine why the facility had not responded to EPA's enforcement actions. Region 2 issued an NOV on April 7, 1998. The facility did not

respond within the required 30 days. A §3007 letter was issued on June 5, 1998 requiring the facility to respond within 15 days. Again the facility did not respond. Region 2 then issued an Attachment to its original NOV noting, "We have not received any response to either the original Notice of Violation or the RCRA §3007 Information Request." After determining that the Region could not take formal enforcement action, the case was referred to NJDEP in November 1998, more than six months after the inspection. In March 1999 NJDEP issued an administrative order and penalty against this facility, more than one year after Region 2's January 15, 1998 inspection.

Our evaluation of the Region's comments on our recommendations follow.

## **Recommendations**

Recommendation No. 1 - We concur with the Region's planned corrective actions.

Recommendation No. 2 - Our review did not indicate that the Region had established and documented time frames for multi-media inspections. Also, we did not see any documentation showing that alternative schedules had been created when the Region could not meet the ERP time frames. If the Region does in fact have procedures, they are not being followed or need review and revision.

Recommendation No. 3 - After repeated requests, the Region provided it's guidelines regarding information request letters. The guidelines stated that "the Section Chief/Team Leader provides a due date for preparing the information request letters and tracks its completion". When the response is received, a decision is made to draft a complaint or issue another

information request letter. Although the guideline does not provide timeframes for drafting or issuing information request letters, RCRA officials advised that supervisors normally give about two weeks to prepare letters after the inspection report is finalized.

Recommendation No. 4 - Our recommendation to seek alternative methods where appropriate was not intended to prevent Region 2 from using §3007 letters. Rather, to consider taking action prior to issuing the §3007 letter (e.g., issuing an NOV or requesting information in the field) to expedite the process by seeking corrective action/agreement at an earlier stage. If that is not possible, then a §3007 letter could be issued. Our review showed the §3007 letter was generally issued a couple of months after the inspection. As a result, it was difficult for the Region to make a determination of appropriate enforcement within 90 days.

Recommendation No 5. - The Region needs to again raise the issue of timely NEIC inspection reports submittal to the national level. If the ERP time frames cannot be met then an alternative schedule should be agreed upon and adhered to and documented.

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## CHAPTER 4

### REGION 2 DID NOT ASSURE THAT RCRIS DATA WAS TIMELY AND ACCURATELY ENTERED

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Assuring that Regional and State personnel provide a reliable RCRIS data base has been a continuing problem in Region 2. Our review of 31 Regional inspections disclosed untimely or inaccurate RCRIS data for 12 of 16 New Jersey and 13 of 15 New York files reviewed. Additionally, Region 2 did not assure that the New Jersey Department of Environmental Protection (NJDEP) recorded accurate RCRIS data. Enforcement activity for all 11 State of New Jersey cases reviewed was inaccurately or incompletely entered into RCRIS. For example, four facilities' SNC status was not correctly entered into RCRIS. Also, in some cases, no information was reported on a facility's return to compliance or Region 2's enforcement activities. These issues were reported in a previous OIG audit report.

These conditions occurred because the Region did not establish adequate procedures or guidelines to assure the timely and accurate entering and reviewing of RCRIS data. Other contributing factors were that (i) neither Department of Enforcement and Compliance Assurance (DECA) management nor the staff fully utilized RCRIS as a tracking or management tool, (ii) many Inspectors believed RCRIS was not "user friendly" thus leading to the system's neglect and errors, and (iii) until recently, the Region had not provided routine RCRIS reports to NJDEP for their review to assure data was entered accurately and completely.

As a result, RCRIS could not provide a true picture of enforcement activity in Region 2. Without reliable data, Headquarters cannot measure EPA's progress in achieving the Government Performance Results Act (GPRA) goals related to RCRA activities. Lack of data also affects the public's right to know about EPA and State enforcement activity.

**RCRA Implementation  
Plans**

EPA's *FY 1996-97 RCRA Implementation Plan* provides:

The essential areas for data quality correspond to the national program accomplishment strategic reporting measures and current program status. These depend upon the validity of the program universes and the timeliness of the events. Regions and States should assure that a key milestone event which occurs in a given month . . . will appear in national reports not more than two months following completion of the activity.

EPA's *Fiscal Years 1998-1999 RCRA Implementation Plan for the Hazardous and Solid Waste Programs* provides:

EPA must have, at a Regional and National level, certain basic information to manage and track the RCRA Program. Our objective is to retrieve these data reliably from the Resource Conservation and Recovery Information System (RCRIS) and the Biennial Reporting System (BRS) in order to support RCRA Program goals which were developed for the Government Performance and Results Act (GPRA). **The reporting of national RCRIS core elements is necessary** to review and

track RCRA Program progress toward GPRA goals.

While all the GPRA performance goals and measures have not been finalized, a variety of approaches were contemplated. According to the September 1997 EPA Strategic Plan:

EPA is striving to develop a range of measures that reflect the broad spectrum of enforcement and compliance activities, the degrees to which they protect human health and the environment, and industry compliance with applicable laws. When this process is completed, performance targets will be set using compliance indicators appropriate to the program and particular universe of regulated facilities involved. The set of indicators could include rates of significant noncompliance, repeat violators, timely and appropriate actions taken, economic benefits recovery, pollutant reductions in high risk areas, and compliance assistance results.

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**UNTIMELY AND  
INACCURATE REGION 2  
RCRIS DATA ENTRY**

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Region 2 Inspectors did not assure that RCRIS data was entered timely or accurately for 12 of 16 New Jersey and 13 of 15 New York files reviewed. One of the more common deficiencies noted was the lack of information in fields of major events such as enforcement action issued or a facility's return to compliance. The following table illustrates eight New York cases reviewed where events which occurred as far back as 1996 were still not reported in a November 25, 1998, RCRIS report.

**Region 2's Enforcement of the  
Resource Conservation and  
Recovery Act (RCRA)**

Facility	BLANK FIELD	Actual
NY1	Actual Compliance Date Enforcement Action Enforcement Issued	09/27/96 NOV 09/03/96
NY8	Enforcement Action Enforcement Issued	NOV 06/21/98
NY10	Actual Compliance Date	05/07/97
NY11	Actual Compliance Date Enforcement Action Enforcement Issued	06/11/97 NOV 05/15/96
NY12	Actual Compliance Date Enforcement Action Enforcement Issued	06/09/98 NOV 05/22/98
NY13	Actual Compliance Date	03/16/98
NY14	Actual Compliance Date Enforcement Action Enforcement Issued	By July 1998 Complaint 06/23/98

Incomplete data does not adequately inform Headquarters or the public of the level of enforcement activity in Region 2 and the status of facility compliance with enforcement actions issued. It may give the unfair impression that facilities which corrected cited violations ignored Federal enforcement efforts. For example, RCRIS reported violations at facilities NY11 and NY12, but did not show that the facilities returned to compliance. Both facilities responded to Region 2's NOVs on a timely basis. Eight months later, the Inspector wrote to facility NY11: "Your facility has been entered in our Data Management System as having achieved physical compliance with the violation cited in the

above referenced letter.” The Inspector sent a similar letter to facility NY12 almost six months after the facility sent a timely response to its NOV. Yet, as of November 1998, RCRIS did not show either facility as in compliance.

**System for Entering  
RCRIS Data**

A Region 2 DECA Environmental Engineer stated that Inspectors entered their own data into RCRIS. He believed inspection dates were entered timely, however, other enforcement data may not be entered until all the activities were completed. It was left to the discretion of the individual Inspector when to enter such data. He also stated that there was no system in place to verify the accuracy of RCRIS.

The Engineer did not believe Headquarters’ knowledge of Regional activities was affected by untimely data entry. The Region usually knew when Headquarters planned to pull RCRIS data. At that time Region 2 staff would update its RCRIS files. In our opinion, this method was not working (as shown in our previous table) since activity from 1996 was not entered in RCRIS. Also, the DECA Section Chief stated that Headquarters used the Docket system to obtain information on formal enforcement actions. However, the Docket system does not contain information related to informal actions.

**RCRIS Not Used as a  
Management Tool**

Neither Region 2 staff nor management officials adequately used RCRIS for tracking enforcement activity. The Engineer said staff did not use RCRIS because it was a management tool. This view was not entirely true. Before conducting an inspection, Inspectors reviewed RCRIS data to determine the enforcement history. Region 2 management also did not fully utilize RCRIS as a management tool. The DECA Section Chief said he used RCRIS to track inspections and NOVs but not a facility’s return to

compliance. He admitted that RCRIS could be utilized to a much greater extent in Region 2.

We believe greater use of RCRIS would have alerted the DECA Section Chief of various problems. Even the Section Chief's limited use of RCRIS should have shown that enforcement fields were often erroneously blank. A review of RCRIS data would also have highlighted cases such as NY9 where it took the Region more than 90 days to determine to issue an NOV. Additionally, no followup was conducted until the facility was re-inspected, 298 days after the NOV was issued. Also, a review of RCRIS data for NJ1 would have disclosed Region 2's untimely followup of NJ1's response to an NOV. This facility took 577 days to return to compliance.

**RCRIS Not  
"User Friendly"**

Regional Inspectors stated that RCRIS data entry was a problem. Inspectors complained that RCRIS was not "user friendly". Information needed to be "linked" and it was not easy to do. In some instances, Inspectors said they had entered data which was not appearing on our RCRIS report. One Inspector said that because information was entered so infrequently (three or four times a year), he sometimes forgot how to enter data. He also said some people did not put their own data into RCRIS and he entered data for other people. While Region 2 cannot change the Agency's computer system, it can provide greater training to its Inspectors so that they can use RCRIS with confidence and accuracy. Region 2 management may wish to discuss with Headquarters whether RCRIS can be improved to make it more user friendly.

**SNC Status**

Another RCRIS deficiency included the erroneous reporting of a facility's SNC status. SNC status for four of the 15 New York facilities was not accurately

reported in RCRIS. Three facilities were reported as SNCs even though formal enforcement had not been taken. The remaining facility, which received formal enforcement, was not listed as a SNC. Region 2 Inspectors agreed that the aforementioned three facilities were erroneously reported as SNCs. In one case, the SNC determination was made before the response to a §3007 Information Request Letter showed that a significant violation had not occurred.

The Inspector responsible for the facility which we believe should have been reported as a SNC provided the following comments. The Inspector for facility NY7 said he probably should have coded it as a SNC because a complaint was issued and it was an oversight on his part.

Maintaining a reliable RCRIS data base was not only a problem for the Region but the State of New Jersey as well. As an environmental partner with New Jersey, the Region was responsible for providing assistance to the State in addressing this problem.

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**NJDEP RCRIS  
DATA ENTRY**

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All 11 cases reviewed at the NJDEP had inaccurate or incomplete RCRIS data. For example, actual compliance dates were missing for eight of the cases. In another case, violations were reported even though the inspection report did not identify any violations. In yet another case, a High Priority Violator's NOV and penalty were not recorded in RCRIS. Other errors included inaccurate/incomplete information on enforcement action taken or violations listed.

**Criteria**

The 1997-1998 Performance Partnership Agreement (PPA) between Region 2 and the NJDEP provides that:

the NJDEP will continue to provide EPA with facility specific inspection and enforcement data, including information pertaining to EPA's core performance measures, through EPA's national data bases

RCRIS is one of EPA's national data bases. The PPA explains the importance of such data:

This information, when considered in conjunction with other data, is important in evaluating compliance and enforcement program activity.

**Results of NJDEP  
Site Visit**

A week before our August 1998 site visit, NJDEP officials stated that they had not received any RCRIS printouts from Region 2. As a result, NJDEP was unaware of the number of RCRIS errors which had accumulated and could not correct them. We found RCRIS errors in all the 11 cases we reviewed. Based on the review of the recently received EPA data, the NJDEP staff identified errors and immediately made corrections.

Prior to July 1997, NJDEP Management Information Section (MIS) staff was decentralized and had only one day of RCRIS training. The NJDEP RCRA Bureau Chief stated that the MIS staff was now located in one office thus providing better overview and training opportunities.

To continue to review and correct RCRIS data, the NJDEP MIS Supervisor said they need to be able to view a RCRIS report on the screen, download it, and print it. All the RCRIS data for a facility cannot be

viewed on a single screen. Also, NJDEP did not have the ability to print out a report. Therefore, Region 2 staff needs to assure that NJDEP is provided a means to continue its review and correction of RCRIS data on a routine basis.

The Region 2 DECA Section Chief said that as of the fall of 1998, NJDEP now had the capability to run RCRIS printouts so that they could now verify the accuracy of their RCRIS data.

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**CONTINUING ISSUE**

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In a December 15, 1993 audit report of Region 2's Administration of State RCRA Enforcement Activities (Report No. 4100128), the OIG reported that RCRIS did not contain accurate and timely information because Region 2 did not maintain quality control procedures over State data collection and Regional RCRIS data input. The OIG recommended that the Regional Administrator:

1. Direct that RCRIS be closely reviewed and timely monitored to assure accuracy and consistency.
2. Develop and implement quality control procedures to ensure the reliability and integrity of the RCRA information system.

We believe these recommendations are still valid today.

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**RECENT ACTION**

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The DECA Branch and Section Chiefs stated they have already taken action to improve RCRIS data

quality and use. In November 1998, monthly customized RCRIS reports were developed to provide managers with a tracking tool for assuring that facilities return to compliance on a timely basis and that inspections, formal enforcement action, as well as NOV information was entered. Region 2 has not only provided the means for NJDEP to review and correct RCRIS data but is doing so according to the DECA Section Chief. He also said Regional Inspectors have been advised that RCRIS data quality is now a priority.

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## **CONCLUSION**

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Data quality is important to EPA both at a Regional and Headquarters level. The Regions can use data systems to help manage their work. GPRA performance measures should be used to determine if the program goals are being accomplished, and also for budgeting purposes. Without timely and accurate Regional and State data, Region 2's efforts may be inaccurately reported which could affect its budget. It is therefore important that Region 2 emphasize to all its Inspectors to maintain up-to-date and accurate RCRIS data. At the time of our audit, Region 2 took measures to improve data quality at the Regional and State levels. DECA managers have made accurate RCRIS data a priority and emphasized its importance to the Regional Inspectors. Also, the DECA Section Chief stated that NJDEP now has a means to verify their data entries and is doing so. However, the Region needs to develop overall data quality control procedures to assure that untimely and inaccurate RCRIS data will no longer be a continuing problem.

**RECOMMENDATIONS**

We recommend that the DECA Chief:

1. Continue the development and implementation of quality control procedures to ensure the reliability and integrity of RCRIS for both Regional and State data.
2. Assure that Region 2 Inspectors and NJDEP verify and correct RCRIS data on a routine basis.
3. Re-emphasize to Inspectors DECA's policy on designating facilities as SNCs. Discourage reporting facilities as SNCs until all information is obtained verifying such status. Inspectors should also obtain management approval of SNC designations.
4. Increase use of RCRIS as a tracking tool at staff and management levels.

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**REGIONAL RESPONSE**

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Region 2 stated that their customized management reports were being used as the data quality control procedures (per OIG Recommendation No. 1) in order to assure that both Region 2 and NJDEP inspectors keep RCRIS accurate and up-to-date (per OIG Recommendation 2).

Region 2 also stated that OIG Recommendations No. 3 and No. 4 have already been implemented.

**OIG COMMENTS**

We concur with the Region's efforts to improve the use and quality of RCRIS.

## **CHAPTER 5**

### **OTHER MATTERS**

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#### **ENFORCEMENT AT NJDEP**

During our site visit to NJDEP, we found that NJDEP generally took timely and appropriate enforcement action as well as assured that violators returned to compliance in accordance with their enforcement documents. NJDEP had an adequate system of controls in place to assure that their RCRA program functioned in accordance with EPA's ERP. We believe NJDEP's use of a Regulatory Citation Summary was an effective tool for identifying violation classifications and penalties. As explained in detail in Chapter 4, NJDEP's RCRIS data was not accurate. However, the Region had begun to provide the means for NJDEP to review and correct their RCRIS entries.

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# APPENDIX 1

## REGIONAL RESPONSE

**Attachment**

### **Region 2 Response to the OIG Audit of Region 2's Enforcement of RCRA**

#### **Executive Summary**

The Executive Summary of this report, which focuses primarily on the effects of delayed reauthorization of New Jersey's RCRA program, notes (p. iii) that Region 2 and New Jersey have agreed to a new base program. We request that the report be updated to reflect that the proposed approval of New Jersey's application for RCRA authorization has been signed by the Regional Administrator, and is expected to be published for public comment in the *Federal Register* during May. A final decision will then be made on the application, perhaps as early as June (the timing will depend on the volume of public comments received and the time required for evaluation).

On page iii, under Improvements Needed in Region 2's Implementation of the RCRA Enforcement Program, the OIG states that:

"Our review of 31 files disclosed that Region 2 did not determine appropriate enforcement action within 90 days as required by the Enforcement Response Policy for 7 of 15 (47 percent) New York and 2 of 16 (13 percent) New Jersey cases. ...Region 2 did not effectively follow up on a facility's return to compliance in 5 of 15 (33 percent) New York and 8 out of 16 (50 percent) New Jersey cases."

These ratios/percentages are not statistically meaningful since, as the OIG explains in Chapter 1, the cases chosen for review were judgmentally selected and, in fact, were selected because these were problem cases. Therefore, it is incorrect to draw conclusions with respect to overall performance levels concerning Regions 2's RCRA Enforcement Program. Based on this, these percentages should be removed from the report. If not removed, the OIG should make it very clear here, and in other parts of the report where ratios/percentages are cited, that these ratio/percentages are based on a judgmentally selected universe.

#### **Chapter 2 - Delayed New Jersey RCRA Reauthorization Impacted Region 2's Enforcement Program**

The draft report is inaccurate in its recitation of the history of RCRA reauthorization in New Jersey in that it does not acknowledge many early Regional efforts to bring problems to the State's attention, nor does it place in a larger context, many of the activities occurring during the 1996-1999 period. In general, Region 2 had

taken many of the steps suggested by the OIG on this issue, and while we agree with a number of the report's recommendations, the Region does not believe this would have reduced the difficulty experienced during the process of the RCRA authorization of New Jersey's . The draft report also overstates the environmental consequences of EPA's inability to enforce RCRA regulations in New Jersey since October 1996.

On pages 10-12, the OIG's description of the events that occurred during 1996 to 1998 ignores early regional efforts regarding the reauthorization of New Jersey's RCRA program, and other events are mischaracterized.

New Jersey's hazardous waste rules were originally scheduled to sunset in October 1995. In early 1995 senior Region 2 managers were in contact with New Jersey officials about this problem, which would have resulted in the lapsing of the State hazardous waste rules. Upon sunset, neither EPA, New Jersey, nor citizens would have had RCRA base program regulations to enforce. Partially as a result of these Regional contacts, the Governor, by Executive Order, extended the life of the existing State regulations for one year (i.e., until October 1996).

After this one-year extension, Region 2 was again in contact with New Jersey officials. Among other contacts, in June 1996, Region 2's Division of Enforcement and Compliance Assistance (DECA) wrote the New Jersey Department of Environmental Protection (NJDEP) Assistant Commissioner for Site Remediation about potential issues bearing on the State's ability to implement corrective action and the wording of any Memorandum of Agreement (MOA). That same month, Region 2 notified the New Jersey Attorney General's office that the Region might not be able to authorize the State for corrective action under RCRA.

Earlier that spring, the Region had been in contact with EPA Headquarters about various issues surrounding New Jersey's adoption of new State regulations before expiration of the authorized regulations in October 1996, and the delayed authorization by EPA of the new regulations. Insuring that State hazardous waste regulations were on the books was judged to be the most critical issue, even if (as the Region recognized) there would be a period of time before EPA could enforce some of them.

By late summer 1996, NJDEP officials were aware of EPA's concerns about its upcoming application for authorization of the about to-be- adopted new State program, including issues **concerning the equivalence of its corrective action program to the federal program and the draft MOA previously submitted by NJDEP**. None of the events described above are reflected -in the chronology of events noted by the OIG in the draft report.'

Contrary to what is stated on page 11, NJDEP did not submit a draft application to Region 2 in October 1996. (For instance, the final part of the draft Attorney General's statement was not submitted until December 1996.) Also, the implication in the draft report that the Region's March 1997 letter to NJDEP was its first written feedback to the State agency is misleading. For example, on October 31, 1996, the Region had sent the State a revised draft of the MOA for its review.

In early 1997, the Region had sent NJDEP for execution, a copy of the MOA that had been negotiated by the staff of each agency, but NJDEP had already raised the issue of the relationship of the proposed MOA to the new National Environmental Performance Partnership System (NEPPS) and, specifically, had questioned whether MOAs were still needed or should be superseded by the new Performance Partnership Agreement (PPA). This issue -- which the draft report never mentions -- was being discussed at the highest levels of NJDEP and Region 2 during

1997, and was but one complicated issue that delayed authorization of New Jersey's new program. The closure issue -- which the draft report highlights -- was not identified until 1997 as a programmatic issue bearing on the State's authorization application, and the issue was elevated as soon as it proved resistant to staff efforts to address and resolve it. In the first part of 1997, it appeared the issue would not prove so intractable as it later proved to be: NJDEP staff did not disagree with Region 2 staff's assessment of the closure situation and had begun addressing the situation. However, the situation could not be fully addressed until NJDEP management was fully apprised of problems and concerns and had the opportunity to address resolution of same.

The chronology of events in 1998 is also inaccurate. The draft report stresses the fact that the State did not respond in writing to the Regional Administrator's September 8, 1997 letter until June 1998. While the State's formal response may have been delayed, the chronology makes no mention of interim events such as a March 1998 meeting attended by senior officials of Region 2 and NJDEP, in which these issues were discussed. Upper management in the Region was, prior to 1998, involved in or informed of all of the issues holding up authorization of the new State program (including the concerns about federal enforceability). Clearly, as of January 1998, the Region made a higher-level and more concentrated "full court" press on all these issues.

On page 11 the OIG states:

"Region 2 allowed NJDEP to delay the application process by not timely elevating action to a higher level when an impasse was reached."

There never was an "impasse" (disagreement on the need to make program changes). The closure problem first came to light in November 1996 but sufficient information wasn't compiled to demonstrate that it was significant enough to delay authorization until January 1997. At that time, this information was highlighted to Region 2 management through weekly reporting procedures and in a draft response from the Regional Administrator to NJDEP Commissioner in early 1997. In discussions and correspondence over the next two years, NJDEP did not really question the necessity of making the required program changes concerning closure. However, some confusion regarding the authorization impacts, and competing priorities at the State level, resulted in a delay in bringing this issue to a resolution.

On page 11 the OIG states:

"NJDEP submitted a draft application to Region 2 in October 1996. According to 40 CFR §271.5(b), Within 30 days of receipt of a State program submission, EPA will notify the State whether its submission is complete...Region 2 did not write of its concerns with NJDEP's proposed closure activities and corrective actions until March 1997, well beyond the 30 day time limit."

The OIG does not acknowledge that there was significant discussion and correspondence between **Region 2 and NJDEP at the** staff level, concerning NJDEP's application, during the period from November 1996 to March 1997 (see above). However, since the issues raised by Region 2 involved multiple NJDEP program units, a mutual resolution required the involvement of senior NJDEP management. As a result, in March 1997, the Region began to draft a detailed response to NJDEP management. This letter, from Region 2 senior management, was sent on May 9, 1997 and provided a detailed description of the closure problem. Also detailed were a description of RCRA closure requirements and recommendations for coordination procedures. The Region believes that this letter was an appropriate step at that time, since closure was an emerging issue that could have been resolved separate from the previously identified concerns regarding corrective action. Based on the above, Region 2 believes the OIG should make it clear in the final report that the closure issue was not perceived by the Region as a significant reauthorization issue until January 1997 and that once it was, it began a process with the NJDEP to resolve it.

On page 13 the OIG states

"For more than two years, EPA and NJDEP disagreed on three main issues in developing the MOA. These issues were NJDEP's need to:

- (1) establish a RCRA Coordinator position to input RCRIS data and track closures;
- (2) prepare a closure strategy; and
- (3) include public participation under corrective action plans."

Although the list of issues is generally correct, the Region believes that to say there was disagreement on these issues is not completely accurate. Region 2 and NJDEP agreed in concept on what needed to be done to resolve the issues, however, NJDEP senior management needed time to understand the programmatic and resources implication of a detailed solution. Had **NJDEP informed the Region that it refused to make** the necessary changes, the Region would have taken appropriate action.

The draft report overlooks the larger context of the issues surrounding RCRA Reauthorization in New Jersey which made their prompt resolution difficult.

The Region's efforts to authorize the new State regulatory program were complicated by larger developments at the federal level. In the summer of 1996, the Region underwent a major reorganization of its structure and its staff and Region 2 managers were managing new programmatic areas. As a result, it took time to identify and understand the ramifications of identified issues and how these related to authorization of the program. Since NJDEP generally was running an effective hazardous waste program, Region 2's withdrawal of New Jersey's hazardous waste program or withdrawing/withholding grant funds were not judged to be appropriate options.

NJDEP's Commissioner felt that efforts should be directed towards development of a new PPA, and not the "old style" MOA that Region 2 had sent the State in 1997. This issue was discussed at the senior management level and it was agreed that the authorization MOA was appropriate.

In addition, the NJDEP had previously reorganized to have consistent cleanup programs without regard to whether the cleanup was occurring under the State Spill fund, ISRA formerly ECRA), or other specific State statutes. The new organizational structure of the State had advantages, but a byproduct was the RCRA closure problem that Region 2 identified in 1997, the solution of which was made more difficult by the new State structure. In short, efforts to authorize New Jersey's new program encountered a series of issues which arose in succession and which were part of larger cross-currents.

The OIG overstated the environmental impact of the delay in New Jersey's RCRA reauthorization. On pages 14 and 15 the OIG states: "...during this period EPA basically was stripped of one of its fundamental powers, RCRA enforcement in New Jersey. Such a loss was not justified considering the harm to the public and environment as illustrated by the following cases."

On page 9 the OIG also states:

"serious RCRA violators continued to harm the environment with impunity.", and

"The Federal government must hope that the State would take appropriate enforcement action once a case was referred. If not, the Federal government had no recourse."

Throughout this period, EPA retained its authority to issue orders under statutory sections such as 3008(h) (interim status orders), 3013 (study orders) and 7003 (potential endangerment situations). All statutory provisions, such as the requirement to have a pen-nit for the treatment, storage or disposal of hazardous waste, remained in full legal effect, as did the Section 3008(e) knowing endangerment section. Facilities were still under permits, and provisions of law adopted pursuant to the Hazardous and **Solid Waste Act (HWSA) Were in legal** effect. While the issue of the enforceability of the federal RCRA regulations was serious and in some cases made referral of an entire matter to the State for prosecution sensible, EPA retained many enforcement tools and could have acted itself if an ongoing environmental harm were occurring. Even if for some particular reason a federal criminal prosecution could not be initiated, EPA could still have issued an order to enjoin any potential imminent and substantial endangerment. Any statement to the contrary is alarmist and inaccurate.

The assumption that companies were able to break the law "with impunity" is wrong. During FY 1997 and FY 1998, New Jersey initiated approximately 100 enforcement actions for hazardous waste-related violations.

The OIG's own review indicates that New Jersey's enforcement actions were generally timely and appropriate. Against this background, the concerns expressed in the draft report seem overdrawn.

As to the discussion of Criminal Impacts on pages 15 and 16 if an endangerment involving solid or hazardous waste had been continuing, the Region could have issued a unilateral order even if a particular prosecutor concluded a federal criminal prosecution was problematic. (Personnel assigned to the case which the region believes is Case No. 2 do not recall that the water table was contaminated.) In only two of the five cases mentioned was a decision made to refer part or all of the case to the State as a result of questions surrounding the enforce ability of the State RCRA regulations. Case I was referred to the State within three weeks of EPA learning of it. In Case 2, county prosecutors were involved in the case within three days of the Criminal Investigations Division (CID) learning of the matter, and three weeks later a large meeting was held with various federal, State, and county officials. Two of the five cases cited are still being actively pursued by federal investigators and prosecutors, so any difficulties enforcing the RCRA regulations did not end the case.

All the above observations are meant to put the situation in perspective and are not intended to suggest that the Region believes this was a desirable situation.

The OIG also discusses two civil cases on pages 17 and 18. Case 1 was not initially considered a SNC by the Region as the OIG states. It became a SNC due to its lack of response to the initial NOV, and the Region's subsequent determination that there was contamination at its site. At that time, the Region issued a 3007 letter to obtain the information needed to support a formal enforcement action. The Region did not immediately refer this case to the, NJDEP because, based on the type of hazardous waste involved, it believed it could take formal action. When the facility did not respond to the 3007 letter, a formal enforcement action was prepared and was sent to ORC for review. However, ORC then determined that the Region's enforcement authority was problematic and the best course of action would be to refer the case to the NJDEP.

Region 2 immediately referred the case to NJDEP, and NJDEP issued an administrative order and penalty based on the information provided by Region 2. The State did not need to conduct its own inspection. It should be noted that this information was provided to the OIG but the OIG incorrectly states, on page 18, that NJDEP had not yet acted on this referral. Also, on page 23, the OIG incorrectly states that NJDEP would not issue an enforcement action without doing its own inspection. These statements need to be revised.

The **second case involved a company that** was issued a NOV for minor violations. This company then took more than six months to respond to the NOV and a subsequent 3007 letter. - However, based on its initial response, Region 2 was aware that it had corrected most of the violations except for some paperwork deficiencies in its Contingency Plan, personnel training records, and land disposal restriction notification records. Region 2 then issued a 3007 letter/NOV in response to these violations. Ultimately, the company corrected these paperwork violations, although in an untimely manner.

The Region would never refer to NJDEP, such a minor, low priority case as this. It would be a poor use of limited resources (State or EPA) better utilized in the many higher priority cases. For example, the Region 2 inspector involved in this case, was at that time, focusing on a facility (near a public school) that needed to develop a work plan for the removal of over 200 drums of hazardous waste. As explained to the OIG,

only SNCs that the Region 2 could not address were referred to NJDEP. Since the violations in the second civil case posed no threat to the environment or public health, Region 2 totally disagrees with the OIG suggestion that a referral to NJDEP should have been made. In addition, the company did not gain any economic benefit as the OIG suggests.

General Comments on the OIG Recommendations, pages 20 - 21

Region 2 believes that many of the steps recommended in the draft report were in fact undertaken. Others were considered but not adopted, and the Region believes that their adoption would not have had significant benefit. None of the recommended steps made, or would have made, a significant difference in more quickly resolving this complex and multi-faceted problem. The Region agrees, however, that earlier written communication of the enforce ability concerns to the Regional Administrator and the Criminal Investigations Division - i.e., to augment and amplify on the oral communications that occurred -- might, in hindsight, have been advisable.

The following comments address specific recommendations included in Chapter 2 of the draft report:

OIG Recommendation No. 1, page 20:

"Develop a process when a State notifies EPA of its intention to repeal its RCRA program. This process should endeavor to avoid a lengthy period where EPA's civil and/or criminal enforcement authority would be adversely effected. The process should consider:

- (a) Establishing reasonable time frames for the State's submission of a complete formal authorization application;
- (b) Developing procedures to expedite enforcement referrals to the State until reauthorization is formally approved. The procedures should outline necessary documentation the State requires to avoid reinspecting a facility before it initiates formal enforcement action;
- (c) Elevating the reauthorization discussions to a higher management level including the Regional Administrator for more aggressive actions if delays are encountered at the program level;
- (d) Withdrawing partial or complete State authorization or suspending/withdrawing Federal grant funds if the State does not timely respond to specific EPA concerns."

As indicated in the above chronology of events, EPA was aware in advance of the sunseting of the State program in 1995 and the State's proposed adoption of a different program in 1996. The new MOA that has been negotiated as part of this reauthorization effort requires (as did the MOA negotiated with New York in 1992) that the State notify EPA sixty days in advance of any proposed changes in its legal authorities that would impact the authorized program. In addition, a schedule had been discussed with the NJDEP in 1996 for its submission of a program, approval application, but due to the unforeseen complexities described above, the schedule unraveled.

The Region does not see the need for, or utility of, a new more formalized referral process in the civil or criminal enforcement arena. Of the five criminal cases discussed on pages 15 - 17 of the draft report, the State was brought into two. In one case, local prosecutors were contacted within three days of the EPA Criminal Investigations Division (CID) learning of the matter, and in the other, a referral to the State occurred within three weeks of CID first learning of the matter. As previously described, civil cases were also referred to the State, as appropriate, and no reinspection by the State was required to gather more evidence in these cases.

As indicated above, the Region believes upper management was timely involved in and aware of the various issues that delayed authorization of the State's newly adopted program. In addition, those managers involved in the regional criminal program were also aware of the situation at an early date. Nevertheless, in hindsight, the Region agrees that written notification in 1996 explicitly informing the Regional Administrator and CID of the enforce ability issues might have been advisable.

Given the ongoing operational responsibilities that were carried by the State throughout this period, full program withdrawal for a finite period of time would have been enormously disruptive to regulators and the regulated, and burdensome to the Region. The Region considered program withdrawal options, but continues to believe that it made the right choice to work with the State to get the new program authorized, rather than initiating program withdrawal processes.

OIG Recommendation No. 2, page 2 1:

"Complete the remaining steps for approving NJDEP's new base program in accordance with the time frames established by 40 CFR §271.

The **Region does not disagree with this recommendation, but underscores that pursuant to 40 CFR §271.20(d), the 90-day deadline starts** when the Region receives a complete program submission. New Jersey submitted a complete final application on January 14, 1999, and the Region expects to public notice its proposed approval of the application during May 1999.

OIG Recommendation No. 3:

"In conjunction with NJDEP, implement an expeditious referral procedure so that any current or additional cases identified can be timely enforced by the State until Region 2 regains its enforcement authority."

The Region believes that it is already referring appropriate cases to the State and agrees that it should continue to do so in a timely manner as long as necessary.

Chapter 3 - Improvements Needed in Region 2's Implementation of the RCRA Enforcement Program

As the OIG notes, of the nine cases in which Region 2 did not make the appropriate enforcement determination within 90 days, and did not take timely enforcement action, two were complicated by being multi-media cases and two were the result of untimely National Enforcement Investigations Center (NEIC) reports. The untimeliness of three of these four cases was due to factors beyond the control of the RCRA Enforcement program, and legitimately fall within the 20% of SNC cases with unique factors that the Enforcement Response Policy (ERP) recognizes will not meet ERP applicable time frames. (Although NY case 13 was a multi-media case, the follow-up issuance of a 3007 letter and Notice of Violation (NOV) should have proceeded while the other programs planned their activities.) However, this is not reflected in the overall findings in the Executive Summary nor at the beginning of Chapter 3. It would be more accurate for the report to state that of the nine untimely cases, three resulted from factors outside of the RCRA Enforcement Program's control. We agree with the OIG that Region 2 did not document these factors in the file nor provide alternative time frames for taking action. We plan to do so in the future.

Another case (NY case 14) also fell into the ERP's 20 % category. This case dealt with very complicated reuse/recycle issues and there was a need to obtain a significant amount of information from the facility. Again, we acknowledge that there was a lack of documentation in the file as to this situation and that alternative time frames for issuing the enforcement action were not specified.

Of the five remaining untimely cases, four were the result of the need to issue 3007 letters. With respect to the OIG's recommendation to consider using alternative methods to 3007 letters to obtain information in support of a formal enforcement action, Region 2 believes that regular use of EPA's information request authority in section 3007 of RCRA is appropriate and results in stronger enforcement cases.

There are many compelling reasons for issuance of 3007 letters. These formal requests for information require that the company officially respond to questions and provide requested documentation. Thus, the response to a 3007 letter can fill the gaps in information that result from the absence of appropriate staff, when the Region conducts an unannounced inspection. This was the situation in NY case 6, where the escort did not realize that cell phones were used as the alarm/communication system (discussed on page 28 and page 29 of the draft report). Another benefit of 3007 letters is that an inspected company's response to a 3007 letter alerts Region 2 as to whether there is any disagreement concerning information provided by the inspection. If the company agrees with the inspection findings, EPA may be able to resolve the case on motion, saving the resources and travel expenses that a full trial may involve. If the company disputes the findings, EPA can assure that its case is well grounded. If appropriate, EPA can send a follow-up letter confirming the information provided to EPA by the company. In a complicated program such as RCRA, this may be necessary to sort out factual nuances that may affect the regulatory status of a facility. Having a formal response from the company makes it harder for the company to distance itself from the information cited and provides EPA with a stronger foundation for any eventual enforcement case.

In the late 1980s when Region 2 forwarded several civil judicial referrals to the U.S. Department of Justice for prosecution, the referrals were returned to EPA with the suggestion that formal information request letters be issued to the potential defendants. Since then, it has been routine practice to issue such

letters. The government has the burden to prove any violations cited in an enforcement case; having a statement from the company enhances the government's ability to do so, and makes it easier to litigate the subsequent case. In addition, the regular use of 3007 letters helps to insure that the agency is not required to pay the other side's legal fees and other costs. Under the Equal Access to Justice Act, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), EPA may have to pay a company's costs if the agency is found to have initiated a case without substantial justification. Since many companies that EPA inspects fall under SBREFA, having a formal response from a company reduces the likelihood that EPA will be in that position.

The Region does not believe that formal requests for information duplicate the inspection. Rather, the 3007 letter is used to obtain additional information on any areas of concern raised by the inspection. The letters are very efficient in that multiple questions can be posed to the company. And, since such a formal request for information is backed by a statutory sanction for lack of a response, the formal request commands a company's attention in ways that an informal request cannot. Receipt of a formal request for information will prompt the company to initiate remedial steps even if no explicit order has been received from EPA (as was done by facilities NY cases 06, 07, and 14). For all these reasons, Region 2 believes that the use of Section 3007 letters is appropriate and any potential disadvantages in using them far outweigh the advantages.

However, in the future, Region 2 will issue Notice of Violations (NOVs) along with any 3007 letters for violations documented during inspections. In this way these violations will be corrected while we obtain the information needed to support a formal enforcement action.

With respect to giving companies two chances to comply as noted by the OIG on page 27, these **two chances refer to the response to 3007 letters**. It is normal Region 2 practice to allow a company a second chance to provide the requested information before a formal action is initiated. We **believe that an Administrative Law Judge (ALJ)** will not be sympathetic to a company that was given two such chances whereas the ALJ might be unsympathetic to EPA if we took an action after only one attempt to obtain the information.

Some data in the table on page 27 are incorrect.

The wrong inspection date was used for NY case 10; the second inspection date should have been used since the decision to issue a 3007 letter was made after this second inspection. Accordingly, it took 31 days to issue the 3007 letter after this inspection, not the 75 days indicated by the OIG. On page 30, the OIG states:

"Region 2 did not effectively follow up on cited violations to ensure facilities returned to compliance in 5 of 15 New York and 8 of 16 New Jersey cases. Three of the five New York and all eight New Jersey cases were issued informal enforcement action. The number of days for these facilities to return to compliance (if they did) far exceeded the 30 days outlined in the issued enforcement action."

The OIG found that Region 2 allowed 13 of the 31 facilities selected for review to remain out of compliance because it did not effectively follow up on these facilities and track their compliance status. This finding is based, in part, on Region 2 allowing facilities 30 days to comply with the violations cited in the NOV. The 30 day period is the shortest period of time that we believe a company needs to correct its violations. As the OIG notes, the Enforcement Response Policy (ERP) allows 90 days for a company to correct its violations. Region 2 believes it is this standard, set by National Policy, that the OIG should be applying in this audit. If the OIG used the 90 day period allowed in the ERP as the standard, four additional facilities would have come into compliance in a timely manner. These are NJ case 6 (31 days to come into compliance from issuance of the NOV); NJ case 9 (42 days to comply); NJ case 13 (77 days to comply); and, NJ case 15 (45 days to comply). In addition, prior to issuance of this draft report, the Region informed the OIG that the wrong compliance dates were entered into RCRIS for NY case 4 and NJ case 16; the correct dates are September 11, 1998, and April 22, 1998, respectively. These dates indicate compliance achieved in 50 and 22 days, respectively. Region 2 recognizes that facilities may need more than 30 days to comply with the NOV and grants reasonable requests for additional time. It is true, however, that the files in many cases do not document such requests and the granting of additional time for compliance. The Region will begin, providing this documentation in the file.

Additional information on specific cases described by the OIG:

The company involved in NY case 3 (a conditionally exempt small quantity generator) had, in fact, responded to the NOV in a timely manner. Its response indicated that it had hired a hazardous waste transporter to transport the wastes in question to a hazardous waste facility. However, because the specific hazardous waste facility was not disclosed, the inspector involved did not identify the company as in compliance until this information was provided. Based on its initial response to the NOV, however, the company came into compliance within 30 days of issuance of the NOV.

**For NY case 10, the correct scheduled date** of compliance is that found in the Final Order negotiated with the company. Compliance was achieved in accordance with this schedule (60 days after the effective date of the Final Order). Use of the scheduled date of compliance found in the complaint is incorrect since a complaint is a proposed action.

For NY case 14, actual compliance was achieved prior to the effective date of the Final Order.

NJ case 8 was referred to the NJDEP after it was determined that Region 2 could not take formal action. This facility had failed to respond to an NOV and a 3007 letter. As discussed above under Chapter 2, a complaint was then drafted but it was determined that EPA did not have enforcement authority. It is incorrect to list this facility as one that was allowed to remain out of compliance because of lack of effective follow-up and tracking. This facility was clearly followed-up on in a timely manner and was referred to the NJDEP once the Region decided it **could not take formal action**.

Based on the above, Region 2 agrees with the OIG on only three facilities that remained out of compliance beyond the 90 day time frame allowed in the ERP (NY case 9, and NJ cases 1 and 2). Of these, both New Jersey cases had minor violations that posed no risk to public health and/or the environment and for which

no economic benefit of non-compliance was derived. NY case 9 was a conditionally exempt small quantity generator that had not made a hazardous waste determination with respect to its small quantity of solvent-contaminated rags and fluorescent light bulbs. In this case, the Region 2 inspector repeatedly attempted by telephone to get a response to the NOV. Finally, he decided to re-inspect the facility. The re-inspection found that the company had come into compliance but had not responded to the NOV. Issuing a formal enforcement action to this facility was deemed inappropriate in light of limited Region 2 RCRA enforcement resources and other higher priority cases.

Based on the above, the following OIG statements on pages iii and iv, are incorrect and should be removed from the report. These statements are:

"Region 2 did not effectively follow up on a facility's return to compliance..." and,

"As a result, hazardous waste which was not managed in an environmentally sound manner risked the protection of human health and the environment. Also facilities may not have been treated consistently and violators may have received an unfair economic advantage."

OIG Recommendation No. 2, page 35:

"We recommend that the Regional Administrator instruct the DECA Chief to establish and implement time frames for coordinating multi-media enforcement cases."

Region 2 has had such procedures in place since the early 1990s. Each month, the Multi-Program Enforcement Steering Committee meets to identify, coordinate, manage, and expedite all multi-media enforcement cases. It should be noted that programs do not have to wait to issue informal enforcement actions, if that is the appropriate response, when other programs are still determining the need/type of enforcement response.

OIG Recommendation No. 3, page 35:

"We recommend that the Regional Administrator instruct the DECA Chief to develop procedures or guidelines regarding the use of Information Request Letters and the issuance of a NOV."

Region 2 does have a guideline regarding the use of 3007 letters. If, as a result of an inspection a possible SNC is identified, then a 3007 letter is issued. Then, the following time frames are in effect: two weeks for the inspector to prepare the inspection report; one week for supervisor/team leader review and report finalization; another two weeks for drafting the 3007 letter, and one week for the concurrence process. Actual time frames may be shorter depending on workload of the inspector. For example, it took only 17 days to issue a 3007 letter in NY case 14 because the inspector was not involved in another major case at that time.

It should also be noted that in FY 1998, Region 2 conducted about 35% of the inspections conducted by the EPA's regional offices nationwide. As a result, Region 2's inspection and enforcement follow-up

workload is significantly greater than that of other Regions and Region 2 inspectors typically have numerous inspection reports to prepare. If this was not the case, the above time frames would be shorter.

OIG Recommendation No. 5, page 35:

"We recommend that the Regional Administrator instruct the DECA Chief to establish time frames in the MOA with NEIC [*National Enforcement Investigations Center*] for submission of inspection reports."

This issue was raised nationally a few years ago but not resolved. Region 2 establishes time frames for inspection report submissions with NEIC on specific inspections, but ultimately the submission of the reports is under NEIC control.

#### **Chapter 4 - Region 2 Did Not Assure that RCRIS Data was Timely and Accurately Entered**

On page 44 of the draft report, the OIG provides an extract from OECA's February 1998 Enforcement and Compliance Evaluation Report on Region 2. The extract implies that Region 2 knew that the States' RCRIS data entry was deficient. However, this extract has nothing to do with the State's RCRIS data entry. Careful reading of OECA's report indicates that it refers to the accuracy of the large quantity generator and TSDF universes in RCRIS, and the difficulty OECA had in determining State inspection coverage of these universes, as well as conducting compliance rate and significant non-compliance analyses of same. This becomes clear when reading OECA's discussion on pages 35, 74, and 75 in that report. It should be noted that Region 2 is in the midst of an extensive RCRIS database clean-up effort.

On page 46, the OIG recognizes the actions that Region 2 started last year to improve the data quality in RCRIS. Although Region 2 already adequately tracked facilities' compliance status, RCRA managers have begun to receive customized management reports to ensure that all compliance and enforcement data are being entered into RCRIS in a timely manner. The monthly customized reports are not only being used to ensure that all NOV's and Return to Compliance data are entered, but to make sure inspections and formal enforcement actions are entered as well. These monthly reports are being used as the data quality control procedures recommended by the OIG (Recommendation No. 1, page 47) in order to assure that both Region 2 and **NJDEP inspectors** keep RCRIS accurate and up-to-date (Recommendation No. 2).

OIG Recommendations No. 3 and No. 4 have already been implemented, as the OIG recognizes on page 46 under the heading Recent Action. Accordingly, in the interests of even-handed reporting, the OIG should note in the Executive Summary the "Recent Action" Region 2 has taken to improve RCRIS data quality.

**Chapter 5 - Other Matters**

The OIG found that the NJDEP generally took timely and appropriate action and returned facilities to compliance in a timely manner, and had procedures in place to assure that its RCRA program functioned in accordance with the EPA's ERP. In the interests of even-handed reporting, these findings should also be included in the Executive Summary. In addition, little information is provided concerning the role that Region 2 has played in assisting NJDEP in development and implementation of its program, through oversight and program/technical assistance.

Region 2s Enforcement of the  
Resource Conservation and  
Recovery Act (RCRA)

## APPENDIX 2

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